



Massachusetts Law Quarterly

FEBRUARY, 1918

CONTENTS

NOTICES (see inside of cover).	PAGE
LIST OF OFFICERS AND COMMITTEES FOR 1917-1918—LIST OF NEW MEMBERS, ETC.,	21
PORTRAITS . . . SAMUEL J. ELDER (<i>frontispiece</i>). CHARLES E. SHATTUCK, facing page	24
THE FORTY-FIFTH, FORTY-SIXTH, AND FORTY-SEVENTH AMENDMENTS TO THE CONSTITUTION OF MASSACHUSETTS ADOPTED NOVEMBER 6, 1917, WITH THE RETURNS OF THE VOTES THEREON, AND A NOTE	25
SPEECHES AT THE ANNUAL DINNER, DECEMBER 7, 1917:	
LIEUTENANT-GOVERNOR COOLIDGE	33
HON. CHARLES A. DECOURCY	35
HON. ROBERT LUCE	41
HON. CHARLES G. WASHBURN	50
PROCEEDINGS AT THE ANNUAL MEETING, 1917:	
PRESIDENT'S ADDRESS ON THE WORK OF THE CONSTITUTIONAL CONVENTION <i>Charles E. Hibbard,</i>	55
REPORTS OF THE EXECUTIVE COMMITTEE, TREASURER, COMMITTEE ON LEGISLATION (REVIEWING LEGISLATION OF 1917, WITH NOTE ON REPORTING CASES TO THE FULL BENCH), COMMITTEE ON GRIEVANCES, AND OTHERS .	62
DISCUSSION OF THE RECENT FORTY-SEVENTH AMENDMENT TO THE CONSTITUTION ON PUBLIC TRADING IN NECESSARIES	84
MEMORIAL OF THE AMERICAN BAR ASSOCIATION AND ADDRESS OF SOLICITOR-GENERAL JOHN W. DAVIS ON THE VOLUME OF AMERICAN JUDICIAL OPINIONS	97
CONVEYANCE OF A FREEHOLD ESTATE TO COMMENCE IN FUTURE (<i>with Forms for Use in Practice</i>) <i>J. L. Thorndike,</i>	111
REMEDIES OF VENDOR IN CONDITIONAL SALES, AGAINST THIRD PERSONS. <i>James M. Rosenthal,</i>	124
"LEGAL OBLIGATIONS" OF THE COMMONWEALTH UNDER THE ANTI-AID AMENDMENT	140
A TEST OF HISTORICAL ACCURACY	148
A SERIOUS PROBLEM IN REGARD TO ABSENTEE VOTING, WITH A NOTE ON THE MOVEMENT FOR ALIEN VOTING	152
THE PROPOSED BILL RELATIVE TO THE SITTINGS OF THE FULL BENCH OF THE SUPREME JUDICIAL COURT	157
THE PROPOSED BILL RELATIVE TO APPEALS FROM PROBATE COURTS (WITH EXPLANATORY NOTES)	160
THE PROPOSED BILL FOR A CONCILIATION SESSION OF THE MUNICIPAL COURT OF BOSTON	164
STATISTICS RELATIVE TO THE POPULATION, VOLUME OF BUSINESS AND SALARIES OF JUSTICES, CLERKS AND ASSISTANT CLERKS IN THE JUDICIAL DISTRICTS OF THE SEVERAL DISTRICT, POLICE AND MUNICIPAL COURTS OF MASSACHUSETTS Prepared by <i>Henry T. Lummus,</i>	166
QUARTERLY TITLE INDEX TO LEGAL PERIODICALS	190

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 16 Central St., Boston, Mass.

NOTICES.

AS TO THE QUARTERLY DIGEST OF MASSACHUSETTS DECISIONS.

In answer to the recent request of the Publication Committee for the views of the members of the Association in regard to the continuance of the "Quarterly Digest," 430 answers were received out of a total membership of the Association of about 800 or more members. Of these answers, 318 were in favor of its continuance, and about 112 answered that they did not find it of sufficient use to them to wish it to be continued. Under these circumstances, and in view of the difficulties of continuing the "Digest," arising from the combined labor and expense, the "Digest" will be discontinued as a department of the magazine, at least, during the war. Whether this part of the work should be taken up again later under more favorable conditions can be considered when those conditions develop.

THE WORKMEN'S COMPENSATION LAW JOURNAL.

While there is no regular department for book reviews in this magazine, members may be interested to have their attention called to a new publication which they may find useful for reference, and accordingly attention is called to a new periodical called "Workmen's Compensation Law Journal," the first number of which has appeared as the January number of 1918. It is published by C. C. Hines Son Co., 100 William Street, New York, N. Y., and is to contain "reports of all decisions rendered in compensation cases in the Federal Courts and in the State Appellate Courts."

REQUEST FOR BACK NUMBERS.

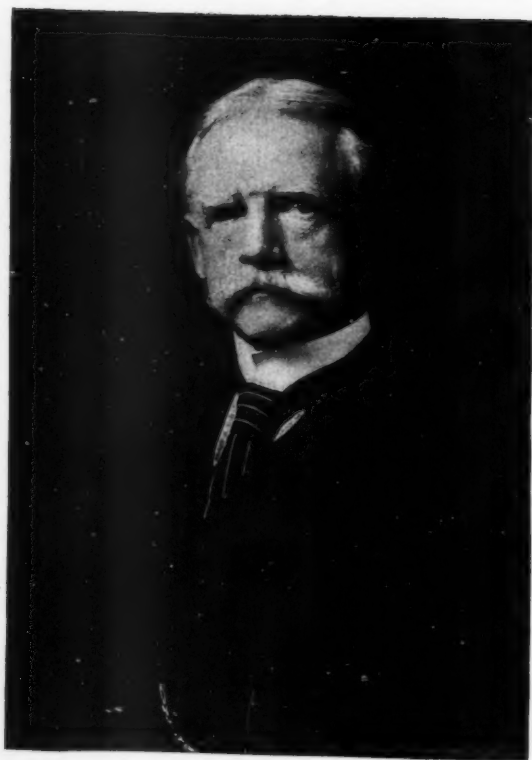
As the Secretary is constantly receiving requests for full sets of this magazine and of the earlier reports of the Committee on Legislation of this Association, from libraries and others, and as some of these pamphlets are out of print, copies, especially of the following, will be appreciated from any one who has a copy tucked away somewhere which he does not care to keep:

Report of the Committee on Legislation for 1915.

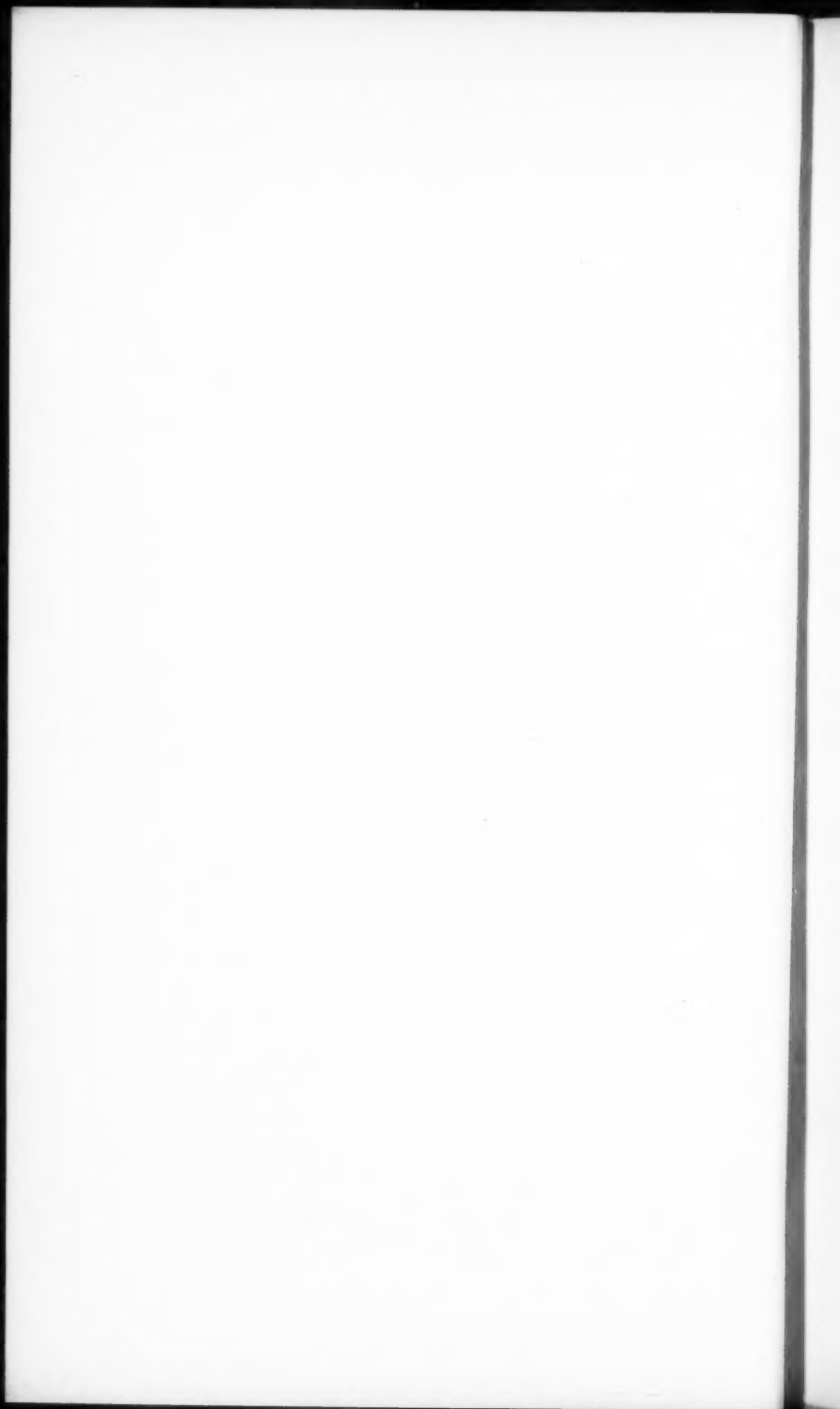
Number 1 of Volume I. of the "Massachusetts Law Quarterly" for November, 1915.

Report of the Special Commission of 1914 to consider and recommend changes in the laws relative to liens, mortgages, and tax titles, House Document No. 1600 of 1915.





Saml. J. Elder.



LIST OF OFFICERS AND COMMITTEES

OF THE

MASSACHUSETTS BAR ASSOCIATION

FOR 1917-1918.

President.

ARTHUR LORD,
Plymouth.

Vice-Presidents.

MARCUS P. KNOWLTON,
Springfield.

JOHN W. HAMMOND,
Cambridge.

JAMES M. MORTON,
Fall River.

Treasurer.

CHARLES H. BECKWITH,
Springfield.

Secretary.

FRANK W. GRINNELL,
Boston.

Executive Committee.

CHARLES E. HIBBARD,	Pittsfield.	FRANK J. LAWLER,	Greenfield.
ELISHA H. BREWSTER,	Springfield.	JAMES A. LOWELL,	Newton.
CHANDLER BULLOCK,	Worcester.	HENRY T. LUMMUS,	Lynn.
ROBERT P. CLAPP,	Lexington.	JOHN W. McANARNEY,	Quincy.
WALTER COULSON,	Lawrence.	JOHN W. MASON,	Northampton.
FRED T. FIELD,	Boston.	JAMES E. McCONNELL,	Boston.
FREDERICK A. FISHER,	Lowell.	FRANK A. MILLIKEN,	New Bedford.
FRANK M. FORBUSH,	Newton.	HENRY B. MONTAGUE,	Southbridge.
JOHN E. HANNIGAN,	Cambridge.	GEORGE R. NUTTER,	Boston.
RAYMOND A. HOPKINS,	Barnstable.	RICHARD W. NUTTER,	Brockton.
GARDNER K. HUDSON,	Fitchburg.	AMOS T. SAUNDERS,	Clinton.

*Committee on Legislation.*FRANK F. DRESSER, *Chairman*, Worcester.

ARTHUR A. BALLANTINE,	Boston.	CHARLES H. MCINTYRE,	Boston.
CHARLES W. BOSWORTH,	Springfield.	JOSEPH MICHELMAN,	Boston.
CHARLES M. DAVENPORT,	Boston.	DENNIS J. MURPHY,	Lowell.
ARTHUR W. DOLAN,	Boston.	HENRY L. SHATTUCK,	Boston.
EDWARD T. ESTY,	Worcester.	JAMES W. SULLIVAN,	Lynn.
EDMUND J. FORD,	Lawrence.	EDMUND A. WHITMAN,	Cambridge.
GARDNER K. HUDSON,	Fitchburg.	THE SECRETARY.	

Committee on Judicial Appointments.

THE PRESIDENT.

FRANK E. DUNBAR,	Lowell.	JOHN F. NOXON,	Pittsfield.
DAVID A. ELLIS,	Boston.	STARR PARSONS,	Lynn.
T. HOVEY GAGE, JR.,	Worcester.	THOMAS W. PROCTOR,	Newton.
JAMES E. MCCONNELL,	Boston.	WALTER S. ROBINSON,	Springfield.

*Committee on Grievances.*FRANK M. FORBUSH, *Chairman*, Newton.

STOUGHTON BELL,	Cambridge.	C. C. KING,	Brockton.
ALBERT BOYDEN,	Beverly.	JOHN W. MASON,	Northampton.
AUGUSTINE J. DALY,	Cambridge.	WALTER S. PINKHAM,	Quincy.
MALCOLM DONALD,	Milton.	PHILIP RUBENSTEIN,	Boston.
HENRY H. FULLER,	Lancaster.	REGINALD H. SMITH, <i>Sec.</i> ,	Boston.
GEORGE A. GASKILL,	Worcester.	GEORGE R. STOBBS,	Worcester.
BERT E. HOLLAND,	Boston.	R. D. WESTON,	Cambridge.

*Committee on Legal Education.*FRED T. FIELD, *Chairman*, Boston.

JOSEPH H. BEALE,	Cambridge.	R. CHALKLEY COLLINS,	G. Barrington.
CHARLES W. CLIFFORD,	New Bedford.	HENRY T. LUMMUS,	Lynn.

*Committee on Membership.*HOLLIS R. BAILEY, *Chairman*, Cambridge.

PERCY A. ATHERTON,	Boston.	HENRY T. RICHARDSON,	Brookline.
FRANCIS N. BALCH,	Boston.	CHARLES B. RUGG,	Worcester.
H. ASHLEY BOWEN,	Lynn.	ALEXANDER WHITESIDE,	Boston.
HAROLD S. R. BUFFINTON,	Fall River.	THE SECRETARY.	

*Committee on Nominations.*CHARLES E. HIBBARD, *Chairman*, Pittsfield.

JAMES F. ATYWARD,	Cambridge.	GEORGE L. MAYBERRY,	Boston.
JOSEPH J. FEELY,	Boston.	HERBERT PARKER,	Lancaster.
FREDERICK S. HALL,	Taunton.	ERNEST H. VAUGHAN,	Worcester.
JOHN C. HAMMOND,	Northampton.	FREDERICK G. WOODEN,	Springfield.

*Committee on Publication of the Massachusetts
Law Quarterly.*

THE PRESIDENT.

HENRY N. SHELDON.

JOHN W. HAMMOND.

GEORGE R. NUTTER.

THE SECRETARY.

Special Committee on Uniform Laws.

ROBERT G. DODGE, *Chairman.*

EDMUND K. ARNOLD.

ROBERT P. CLAPP.

GEORGE P. DRURY.

THE SECRETARY.

List of Past Presidents of the Association.

RICHARD OLNEY, of Boston, 1909-1910.

ALFRED HEMENWAY, of Boston, 1910-1911.

CHARLES W. CLIFFORD, of New Bedford, 1911-1912.

JOHN C. HAMMOND, of Northampton, 1912-1913.

MOORFIELD STOREY, of Boston, 1913-1914.

HERBERT PARKER, of Lancaster, 1914-1915.

HENRY N. SHELDON, of Boston, 1915-1916.

CHARLES E. HIBBARD, of Pittsfield, 1916-1917.

CHARTER, BY-LAWS, AND LIST OF MEMBERS.

The Charter and By-Laws and List of Members of the Association are printed in the Supplement to the November number of the Quarterly for 1916, Vol. II., No. 2.

Since that list was printed the following new members have joined the Association:

JOHN H. APFLETON,
6 Beacon St., Boston.HARLAN H. BALLARD, JR.,
Little Bldg., Boston.WARREN J. BLOOM,
70 State St., Boston.MOSES S. CASE,
37 Pleasant St., Marblehead.ELMER L. CURTIS,
89 State St., Boston.GEORGE C. CUTLER, JR.,
Shawmut Bank Bldg., Boston.WALTER A. DANE,
Tremont Bldg., Boston.HENRY W. DUNN,
Yale School of Law,
New Haven, Conn.HERBERT B. EHLMANN,
70 State St., Boston.GEORGE R. FARNUM,
Barristers Hall, Boston.RALPH S. FICKETT,
53 State St., Boston.EDWARD FISCHER,
39 Court St., Boston.FELIX FORTE,
16 Central St., Boston.JONATHAN W. FRENCH,
45 Milk St., Boston.

ABRAHAM GOLDBERG,	Lynn.	FRANK MULREADY,	85 Water St., Boston.
ALEXANDER G. GOULD,	40 Court St., Boston.	HERBERT A. PALMER,	50 Congress St., Boston.
ARTHUR V. HARPER,	110 State St., Boston.	CHARLES A. RUSSELL,	Savings Bank Bldg., Gloucester.
TIMOTHY S. HERLIHY,	Newburyport.	JOHN J. RYAN,	Haverhill Trust Co. Bldg., Haverhill.
CHARLES E. HOUGHTON,	Registry of Deeds, Dedham.	ALBERT J. SARGENT,	Mattapan.
FREDERICK E. JENNINGS,	45 Milk St., Boston.	IRVING SARGENT,	Lawrence.
H. NEWTON JOYNER,	Great Barrington.	FRANK M. SILVIA,	Fall River.
PAUL L. KEENAN,	53 State St., Boston.	CHARLES N. STODDARD,	Greenfield.
JAMES T. KIRBY,	Bank Block, Whitman.	JOSEPH D. TAYLOR,	39 Court St., Boston.
EDWARD A. MACMASTER,	Bridgewater.	CHARLES TOYE,	18 Tremont St., Boston.
FREDERICK W. MCGOWAN,	Tremont Bldg., Boston.	SUMNER YORK WHEELER,	Salem.
G. ANDREWS MORIARTY, JR.,	16 Central St., Boston.	GEORGE W. WIGHTMAN,	39 Court St., Boston.
		FRED HOMER WILLIAMS,	60 Congress St., Boston.

The secretary has received notice that the following members have died since the printed list of November, 1916, above referred to:

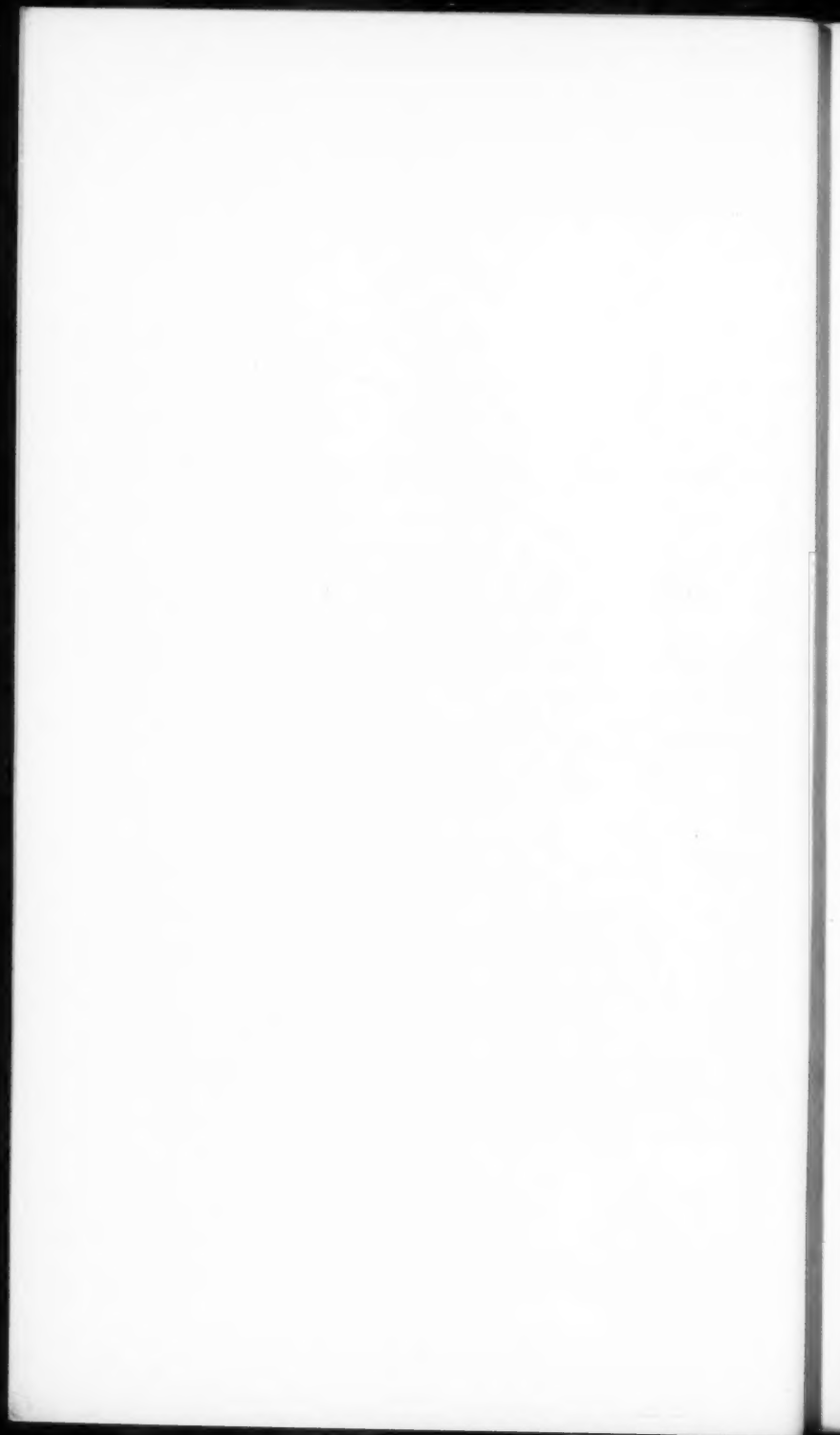
J. H. BENTON.	EDWARD H. MASON.
CHARLES E. BURBANK.	RICHARD OLNEY.
GEORGE LEMIST CLARKE.	EDWARD C. PERKINS.
JAMES T. CUMMINGS.	CHARLES B. PERRY.
SAMUEL J. ELDER.	CHARLES C. READ.
CHARLES S. ENSIGN.	CHARLES G. SAUNDERS.
JOSEPH D. FALLON.	CHARLES E. SHATTUCK.
JOHN H. HARDY.	ARTHUR L. SPRING.
GEORGE V. LEVERETT.	ROGER F. STURGIS.
DANA MALONE.	CHARLES M. WILLIAMS.



CHARLES E. SHATTUCK.

Appointed a Judge of the Superior Court, November 14, 1917.

Died January 29, 1918.



THE FORTY-FIFTH, FORTY-SIXTH, AND FORTY-SEVENTH AMENDMENTS TO THE CONSTITUTION OF MASSACHUSETTS ADOPTED NOVEMBER 6, 1917, WITH THE RETURNS OF THE VOTES THEREON.

THE FORTY-FIFTH AMENDMENT.

This appeared on the ballot as follows:

To vote on the following, mark a Cross X in the square at the right of YES or NO:—

Shall the following Article of Amendment relative to absentee voting, submitted by the Constitutional Convention, be approved and ratified?

1	
YES	
NO	

Article of Amendment.

The General Court shall have power to provide by law for voting by qualified voters of the Commonwealth who, at the time of an election, are absent from the city or town of which they are inhabitants in the choice of any officer to be elected or upon any question submitted at such election.

In accordance with the order of the convention public proclamation was made by the Governor, announcing its ratification and adoption by the people as the Forty-fifth Amendment, on November 28, 1917.

The report of the Executive Council of the votes upon this amendment is as follows:

	Yes.	No.
County of Barnstable	1,683 votes.	265 votes.
" Berkshire	7,202 "	2,210 "
" Bristol	15,769 "	8,386 "
" Dukes	329 "	66 "
" Essex	29,660 "	11,019 "
" Franklin	3,026 "	636 "
" Hampden	13,251 "	4,472 "
" Hampshire	3,847 "	1,322 "
" Middlesex	53,125 "	16,824 "
" Nantucket	285 "	60 "
" Norfolk	15,828 "	3,834 "
" Plymouth	10,619 "	2,620 "
" Suffolk	50,113 "	16,473 "
" Worcester	27,168 "	8,522 "
Totals	231,905 votes.	76,709 votes.

And the said Article of Amendment appears to be ratified.

The number of persons who voted at the State Election, as returned under the provisions of Chapter 835, Section 329, Acts of 1913, as amended by Chapter 109, Section 3, General Acts of 1917, was 394,070.

THE FORTY-SIXTH AMENDMENT.

This appeared on the ballot as follows:

To vote on the following, mark a Cross X in the square at the right of YES or NO:—

In place of Article 18 of the Articles of Amendment of the Constitution, shall the following Article of Amendment relative to appropriations for educational and benevolent purposes, submitted by the Constitutional Convention, be approved and ratified?

	2
YES	
NO	

Article of Amendment.

Article XVIII. Section 1. No law shall be passed prohibiting the free exercise of religion.

Section 2. All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Section 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

Section 4. Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.

Section 5. This amendment shall not take effect until the October first next succeeding its ratification and adoption by the people.

Its ratification and adoption as the Forty-sixth Amendment was proclaimed by the Governor on November 28, 1917.

The report of the Executive Council shows the following votes upon this amendment:

	Yes.	No.
County of Barnstable	1,721 votes.	351 votes.
" Berkshire	6,907 "	3,065 "
" Bristol	13,917 "	13,862 "
" Dukes	334 "	74 "
" Essex	28,354 "	17,641 "
" Franklin	2,902 "	895 "
" Hampden	11,665 "	6,675 "
" Hampshire	3,305 "	2,018 "
" Middlesex	48,190 "	29,078 "
" Nantucket	254 "	104 "
" Norfolk	15,184 "	6,288 "
" Plymouth	10,252 "	4,405 "
" Suffolk	38,654 "	33,393 "
" Worcester	24,690 "	12,508 "
Totals	206,329 votes.	130,357 votes.

THE FORTY-SEVENTH AMENDMENT.

This appeared on the ballot as follows:

To vote on the following, mark a Cross X in the square at the right of YES or NO:—

Shall the following Article of Amendment relative to the taking and distribution by the Commonwealth and its municipalities of the common necessities of life, submitted by the Constitutional Convention, be approved and ratified?

3	
YES	
NO	

Article of Amendment.

The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessities of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.

Its ratification and adoption as the Forty-seventh Amendment was proclaimed by the Governor on November 28, 1917.

The report of the Executive Council shows the following votes upon this amendment:

	Yns.	No.
County of Barnstable	1,718 votes.	224 votes.
" Berkshire	8,099 "	1,434 "
" Bristol	18,896 "	5,835 "
" Dukes	359 "	49 "
" Essex	35,049 "	7,214 "
" Franklin	3,251 "	417 "
" Hampden	15,252 "	2,696 "
" Hampshire	4,138 "	998 "
" Middlesex	59,699 "	11,419 "
" Nantucket	309 "	42 "
" Norfolk	17,339 "	2,639 "
" Plymouth	12,219 "	1,604 "
" Suffolk	55,861 "	11,153 "
" Worcester	28,930 "	6,102 "
Totals	261,119 votes.	51,826 votes.

Note.

Special attention is called to the fact that the foregoing amendments have been reprinted above in the same form and type in which they appeared upon the ballot. The difference in the size of the type between the title or "description" of the proposal and the body of the proposal is in accordance with the common practice where the whole act is printed on the ballot, so that the voter can read it. The use of the small type for the substance of the bill, and of the large type for the title or "nickname" which has been given it is, of course, in accordance with the mechanical conception of a short ballot.

While there is nothing new about this, yet the appearance of these questions on the ballot is an interesting object lesson to be reflected upon in connection with that part of the proposed Initiative and Referendum resolution, which is to be voted upon by the people on November 5, 1918, providing that

"Each proposed amendment to the constitution, and each law submitted to the people shall be described on the ballots by a description to be determined by the attorney general, subject to such provision as may be made by law," coupled with the further provision that

"The secretary of the Commonwealth shall cause to be printed and sent to each registered voter in the Commonwealth the full text of every measure to be submitted to the people, together with a copy of the legislative committee's majority and minority

reports, if there be such, with the names of the majority and minority members thereon, a statement of the votes of the General Court on the measure, and a description of the measure as such description will appear on the ballot; and shall, in such manner as may be provided by law, cause to be prepared and sent to the voters other information and arguments for and against the measure."

As has been pointed out from time to time these provisions seem to make the attorney general (in addition to his present duties) into a legislature consisting of one man "subject to such provision as may be made by law," whatever that may mean from time to time. He is to have the ultimate constitutional power to "determine" the form and phraseology of the "description" or "nickname" or "catchword" which (whatever may be the theory) everybody knows, in fact, will be the only portion of the amendment or law which the majority of persons voting upon it will ever read. The duties of the secretary of the commonwealth in issuing the pamphlet above mentioned are to help out the situation by providing the voters with the full wording of the law, together with the "description" which is to "appear upon the ballot," so that the substance of the law may be recognized by its "description" or "nickname" by those who have taken the trouble to read the pamphlet. So far as it goes this provision for circulating information is a good one. It ought to be done on every measure submitted to popular vote, whether we adopt the initiative and referendum or not. But as no method has ever yet been devised for making the majority of horses drink after they have been led to the water, it is important that we should approach the question of the initiative and referendum with our eyes fully open to the fact that it provides a machine which can be started by ten men and signatures, to submit a specific measure to popular vote at the polls under a "description," the wording and form of which is to be finally determined by a small legislature consisting of a single man elected at large by the people of the state and called, because of his other duties, the "attorney general."

Attention is called to these facts in this manner and in this place in order to provoke discussion at a time when men are thinking about other things. The full proposal of the initiative and referendum referred to is printed in No. 1 of Vol. III. of the Quarterly, which was sent to members a few weeks ago.

As a practical illustration of what is said in this note, attention is called to the title or "description" of that resolution, which reads as follows:

" RESOLUTION

To provide for establishing the Popular Initiative and Referendum, and the Legislative Initiative of Specific Amendments of the Constitution."

Any one who goes on to examine carefully, first, the "Definition" at the beginning and then the practical details of machinery provided, can decide for himself whether the title above quoted can honestly be called a "description" of what follows it, or whether it is a "nickname" or "catchword" of the most ingenious brand of political "camouflage."

As appears from the order adopted by the convention and reprinted on pages 16 and 17 of Vol. III. of the Quarterly, the question which is to appear upon the ballot in regard to this matter is as follows:

"Shall the Article of Amendment relative to the establishment of the popular initiative and referendum and the legislative initiative of specific amendments of the Constitution, submitted by the Constitutional Convention, be approved and ratified?"

The three amendments which were submitted by the convention and ratified by the people at the election last November were printed in full upon the ballot, even though they were printed in small type.

As to this proposed amendment, however, nothing whatever is to appear upon the ballot, except the question above quoted. No doubt a copy of the fifteen pages containing the details will be mailed to every voter before the election, so that he can read it if he wants to, digest it if he takes the trouble to do so, and remember its details if he can, when he comes to the voting booth.

F. W. G.

PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES
SUBMITTED BY THE SIXTY-FIFTH CONGRESS AND NOW PENDING
BEFORE THE LEGISLATURES OF THE SEVERAL STATES.

"SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." (Submitted to the States December 3, 1917.)

THE ANNUAL DINNER.

The annual dinner of the Association was held at the Boston City Club on Friday evening, December 7, 1917. About two hundred and seventy-five members of the Association were present. Charles E. Hibbard, of Pittsfield, President of the Association, presided.

This gathering of the Association took place both in the midst of war and in the midst of the deliberations of the Constitutional Convention, in which the entire structure of the state government is being reëxamined with possible results, from the history, position, and the influence of Massachusetts and her example, of very far-reaching consequences to the nation, and to the relation of states to the national government, and consequently to the strength and integrity of the Union. Under these circumstances, by the courtesy of the Bostonian Society, the large portrait of James Otis, which hangs in the council chamber of the Old State House in Boston, where he argued against the Writs of Assistance in 1761 and in his argument laid the foundation of American constitutional law, was placed above the head table, so that the first great leader of the Massachusetts Bar in the public service of the state might be a guest of the Association, and, perhaps, by his presence help to stir those generous professional impulses which have contributed so much in the past to the service of the state and nation.

As both Judge Morton and Judge Hammond were present the dinner was the occasion for a birthday party in honor of their eightieth birthdays. A special number of the "Massachusetts Law Quarterly," containing their portraits, was issued and distributed at the dinner and copies of this number, which is No. 2 of Vol. III., were subsequently mailed to all the members of the Association. After the distribution of the Quarterly two birthday cakes, each

bearing eighty lighted candles, were brought in and presented to them by President Hibbard as follows :

"Our friend Judge Morton and our friend Judge Hammond : These birthday cakes so enthusiastically presented to you by the members of our Association here assembled are more eloquent of the respect and affection entertained for you by the members of the Massachusetts Bar Association than any words which I might offer could be. I assure you they are an expression of genuine affection and they carry with them the wish for each of you of many years of happiness and of health."

SPEECHES AT THE DINNER.

PRESIDENT HIBBARD. — *Members of the Massachusetts Bar Association:* While I go out of office to-morrow morning, this is the first opportunity I have had of meeting the members of the Association as a body, and I hope you will not think it too late for me to thank you for the undeserved honor which you a year ago conferred upon me in making me President of the Association. The office has brought with it many pleasant duties and many pleasant associations with the members of this Association and with members of like associations in other states. The duties of the office have been somewhat onerous and exacting, all of which duties have been discharged faithfully, punctually, and successfully — by the Secretary, Mr. Grinnell. For myself, and I believe for the Association, I thank Mr. Grinnell for his faithful service during the past year, and I would recommend to the incoming president, if he would lessen his burdens as president, that the services of Mr. Grinnell be retained. This has been an eventful year in Massachusetts for certain reasons. Two great calamities have overtaken the Commonwealth, one the foreign war, in which the nation is engaged, and in which Massachusetts is taking her part, as she always does on occasions calling for patriotic service. The other calamity is the Massachusetts Constitutional Convention. When these two calamities will be overcome, no one can tell. The first must be overcome by large contributions of money and sacrifice of the very best that we have. The second calamity can be overcome by the legislature refusing a further appropriation. As I have

spent nearly six months in the pit of the House of Representatives and months ago parted company with my mileage and salary, it would not be becoming in me to say what the legislature ought to do.

We have with us to-night a representative of the Commonwealth of Massachusetts. From certain election returns which I have read recently, and I read these election returns, not with the interest I used to, being a Democrat, I have come to believe that the returns show that this gentleman is known by most of the people in the commonwealth, and needs no introduction, and so I simply present to you the Lieutenant-Governor of the commonwealth, Honorable Calvin Coolidge.

ADDRESS OF LIEUTENANT-GOVERNOR COOLIDGE.

Mr. President, — Gentlemen of the Massachusetts Bar Association :

The good opinion of the bar is very gratifying to me. I hope that it does not exist as a result of my not being able to practise law at the present time. This is another one of those happy occasions for His Excellency when he is absent and I am present, giving me the opportunity to convey to the gathering that I know he would, if he could, be delighted to stand before, the heartiest greetings of the Commonwealth of Massachusetts.

I have felt rather under an obligation to the Massachusetts Bar Association for some time and I am glad of this opportunity to express it. It was not long ago that I was a member of the General Court and at that time the General Court received great assistance, great help, and good counsel from the Massachusetts Bar Association, expressed, as your president has already indicated, through your very able and efficient secretary. And I know that because of the work that Mr. Grinnell has done, legislation in Massachusetts has been a little wiser, a little juster, and a little better than it otherwise would have been. When I say that I have said a good deal, for legislation here has always come up to a very high mark, as you members of the bar know.

This might be a time when we could stop and consider the great services that members of the bar have rendered to the commonwealth. But I note that the president began at the lower end of the speakers' list, so I do not believe it is necessary or fitting that I should take the time to do that. But if you will go to the State House and examine there not only the statutes,

but also the statutes and the memorials that are there, you will see many of them made to commemorate members of the Massachusetts Bar who have been with us in the past. And that patriotism and that loyalty to service that has been manifested in the past is manifest to-day, and it is not altogether a peculiarity of the bar. It is a very wonderful thing, when you come to think of it, that the United States Government could be able to market seven billions of bonds without having to pay any commission for the service. All of our people are turning out in the present time to do everything that they can to protect this country in its hour of need. Members of the bar have recently been called upon; I know that they are going to respond, and respond gladly. We have an army in the field. We need not only the army that is in the field, but we need an industrial army at home, because we realize that in these days wars are not carried on altogether by the men at the front; they must be backed up and supported by the men who are staying at home and engaging in the great industrial operations. It will be something that the bar can do if upon occasion when the opportunity presents itself we carry that message to our fellow-citizens. Americans are patriotic, they desire to do the things that are necessary in order that we may win this great contest and secure a peace with honor, and if the way is pointed out to them they will respond. And it is the part not only of the Massachusetts Bar Association, but of the whole bar of this great nation to do its part in that direction.

PRESIDENT HIBBARD.—It has been a great relief to me to listen to the remarks of the Lieutenant-Governor and his laudatory words respecting the legislature. I have heard so much during the last six months about the shortcomings and the corruption of the Massachusetts Legislature that I had begun to believe that the members were really what a certain well-known lawyer described them as: "Rodents which infested the State House because of the cheese stored there and which they were able to secure," but I judge from the remarks of the Lieutenant-Governor that this is not wholly true.

Some years ago a legislative committee came to Berkshire County to make some investigations as to the necessities of the courts, and I made the remark to them which was brought back to the eastern part of the state and told to the judges, that the first

question which a judge asked after reaching Pittsfield to hold court was: "What time the next train left for Boston," and there was a measure of truth in my remark. In those days a sheriff met the judge at the station, escorted him to the hotel, left him there until the next morning, whether under lock and key I do not know, and then escorted him to the Court House and back to his dinner, and the judge was seldom seen alone on the street, whether from fear of the natives or modesty I do not know, but there came a time when there was a change, and the remark made by me some years ago is in no sense true to-day. A newly appointed judge to the bench of the Superior Court came to Pittsfield, and he discovered some of the beauties of the county and enjoyed much of the hospitality of the lawyers and citizens of Pittsfield. To-day I don't know of any judge who is anxious to get out of town, especially during the season when the golf club is open. That judge who discovered the beauties of Berkshire and enjoyed the hospitality of its citizens is now an honorable member of our Supreme Judicial Court, and it gives me great pleasure to introduce to you our friend, Justice Charles A. DeCourcy.

ADDRESS OF HONORABLE CHARLES A. DECOURCY.

Mr. President, — Brethren of the Bar :

In the regretted absence of the Chief Justice let me first thank you for this very cordial greeting extended through me to the Supreme Judicial Court. So long as that Court is influenced by the tradition of its former members, seated at this table to-night,* it will be entitled to your enthusiastic greeting. . . .

In these crucial days, whenever thoughtful and patriotic Americans come together, their minds instinctively turn to some phase of the great world war. Primarily we are concerned with its successful issue. To that result we who are not eligible for military duty are doing and will do our full share; contributing our money, our services, and (many of us) sons, whose lives are very dear to us.

But the fight for democracy will not end with the return of peace. After this war against autocracy, we shall be confronted

* The former judges referred to who were seated at the table were Judges Morton, Hammond, and Sheldon.

with political, social, and economic problems that will test the efficiency, and it may be even the existence, of democracy. And if we would avoid another costly lesson in unpreparedness, now is the time to adequately plan and organize for the days ahead.

The form which some of these problems will assume cannot yet be known. But the manner in which we must face all of them can and should be realized now. Our institutions are too big and too complex to muddle along, without constructive planning. In the words of Prof. John Dewey, "We have said long enough that America means opportunity; we must now begin to ask: Opportunity for what, and how shall the opportunity be achieved?" It is a platitude that the success of democracy demands the best energies of an enlightened, united, and self-sacrificing citizenship. But we must realize that an enlightened citizenship implies a people who will not ignore or despise the experience and wisdom of the past; who will not demolish existing institutions until they have carefully provided for others that are practical and better; who will select experts to do their expert work; and will put aside leaders who are more concerned with free thought than with coherent thought, and whose tendency is "not to redress a grievance but to create one." It is said that Michael Angelo once entered a palace at Rome where Raphael was ornamenting the ceiling, and saw that the figures were too small for the room. With a few bold strokes Angelo sketched on one side a head of heroic size, proportioned to the chamber. When his friends asked for an explanation, he made the suggestive reply, "I criticise by creation, not by finding fault."

One of the most important problems that will confront us after the war is the ever present and fundamental one of the administration of justice. The success of democracy must largely depend upon keeping the laws responsive to the changing social, industrial, and other complex changes of a progressive people. So far as the substantive law is concerned, it rests mainly upon the citizens at large to bring about by legislation the changes they desire. But for the important branch of procedure—the machinery by which substantive rights are enforced and wrongs redressed—the lawyers are especially responsible. And when (as to-day) false and exaggerated information is broadcast in the community as to the work our courts are doing, I venture to urge that the bar owe it to their profession and to the state, not only to keep themselves informed of the existing conditions, but also to inform their fellow-citizens what the true facts are as to those conditions. Thus only can we avoid legislation based on misleading and exaggerated

statements; secure wise and progressive reforms; and preserve public confidence in the administration of the law.

Much of the current criticism of courts and procedure makes it necessary for us to emphasize the fact, too often ignored by the public, that law reform, and especially criminal law reform, is essentially a local question and calls for local action and remedies. People forget that we have almost fifty independent jurisdictions, state and federal: each with its own legislature to enact its laws and courts to construe and apply them. Scarcely a week passes without attention being called in the press or from the platform to some absurd statute or technical decision or antiquated procedure in a distant state, as if it were typical of all the states, including our own. I could refer to a number of recent instances of misleading comments, liable, and sometimes designed, to weaken the confidence of the average law-respecting citizen in our courts. To refer to a single experience: some time ago I attended a meeting in Tremont Temple to hear an address by a noted New York orator. As he attacked the courts in general language for their alleged inefficiency and delay, especially in enforcing criminal law, which affects the liberty, safety, and property of every one, and the great audience applauded his words, I looked about in astonishment. The people applauding the speaker's indignant criticisms were not recent immigrants, ignorant of our institutions; they were not radical socialists, opposed to the existence of all courts; they were not a class organized to bring about changes for their own selfish interests: but a body of apparently intelligent and respectable American men and women of New England birth and traditions. Probably not one in five hundred of them ever was in a court-room, or had any actual knowledge of the administration of criminal law in this commonwealth.

Within a few days thereafter I took occasion to examine the Massachusetts Prison Commission's reports for the years 1909 and 1910, and the reports of our decisions covering the same period, with this result:

In the year ending September 30, 1909, the whole number of arrests in the state was	147,019
Cases begun in the Superior Court (Grand Jury and Appeals),	9,015
Cases brought to (jury) trial,	1,432

In those twelve months but thirteen criminal cases were brought before the Supreme Judicial Court; and of these only one (involving two complaints) was sent back for another trial.

Again, for the year ending September 30, 1910, —

Number of arrests was	149,680
Cases entered in Superior Court,	8,366
Cases tried in Superior Court,	989
Heard in Supreme Judicial Court,	17
and new trials in not over	3
(Exceptions sustained in 5)	

One of my former associates examined Vols. 187 to 206, inclusive, covering the six years from November 21, 1904, to October 27, 1910, and found 89 criminal cases argued in the Supreme Judicial Court and new trials granted in only 10. (66 overruled, 23 sustained. No new trial 13.)

I may add that the Report of the Bureau of Prisons for the year 1916, recently issued, shows, —

The number of arrests for all offenses,	186,363
There were entered in the Superior Court (Grand Jury and Appeal),	11,029
There were brought to trial, — September 30, 1915–September 30, 1916,	886

During the calendar year 1916 (Vols. 223–4) only 12 cases were argued or submitted in the Supreme Judicial Court. Exceptions were overruled in all but two, and these were finally disposed of without being sent back to trial.

If such facts as these were generally made known, as they should be, we would hear less talk about rich criminals escaping punishment by reason of alleged multiplicity of appeals to the higher courts. And if our citizens were made aware of the model Criminal Procedure Act, largely formulated by my former associate, Mr. Justice Sheldon, and in operation here since 1899, the attacks upon our courts for alleged technical procedure would be seldom heard.

The delays assumed to prevail in the trial of civil causes is another common topic of complaint. What are the facts? When the June consultation closed the work of the Supreme Judicial Court for last year, an opinion had been written in every case that had been argued or submitted on briefs to the Full Court during the year. And substantially the same condition of the docket has existed for years.

In the Superior Court for this great county, with 10,000 cases entered in a year, there were on the October general trial list 7,587 cases. The clerk informs me :

"On the general jury lists cases are now being tried which were entered in October and November, 1916. In January cases entered ten months before will be reached and in April cases pending eight months will be tried. It is fair to say that any case can be tried within a year after its entry, and in many cases the time will be much less.

"The end of the October Special Jury Trial List for 1917 was reached at the call of October 18, 1917. Cases can usually be reached on this list within three months of entry. On the Jury Waived List cases can usually be tried within one or two months after the pleadings are completed. Suits in Equity can usually be tried as soon after entry as parties may desire. The case on trial in Equity Merit Session to-day (Tuesday, December 4, 1917) was entered November 20, 1917. Divorce libels can be tried within two or three months after they become ripe for trial. Any delay beyond the periods mentioned above is usually due to cases not being ready for trial, or to engagements of counsel."

Chief Justice Bolster has given me the following information as to the Municipal Court of the City of Boston:

Civil cases entered, 1916,	16,095
Removed to Superior Court,	401
Final jurisdiction retained,	15,694
Markings for trial,	13,879
Non-suit and default on trial list,	2,774
Markings leading to actual trial,	11,105
Actual trials,	1,760
Cases reaching Appellate Division,	93
Appealed to Supreme Judicial Court,	19

"By the rules, the parties join issue three days after entry; case can be marked for the following week. As we have inverted our trial list, placing late cases first, a case can be tried, so far as the Court is concerned, within ten days after its entry.

"Criminal cases begun, year ending October 1, 1917:

Drunkenness cases released by probation officer,	35,949
Drunkenness cases arraigned,	14,586
Total,	50,535
Other criminal cases,	16,370
Total,	66,905
Appealed to Superior Court,	2,044

"The only delays incident to criminal trials arise from continuances after arraignment. It is usually a matter of but a few days."

The judges of Probate report a like condition in their busy court.

In the two busy weeks since the receipt of your invitation I have had scant leisure in which to make further investigation of figures indicating the promptness with which justice is administered in our courts. As to the efficiency with which that great duty is performed, for obvious reasons I cannot speak. But I am tempted to quote the words of my old friend, Mr. Justice Holmes: "It is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives and would be glad of evidence that one was consciously bad."

You will not, of course, infer from what I have left unsaid, that I condemn fair criticism of courts, or that I see no defects in our present procedure. Some defects there are, such as the delays incident to our practice of sending cases to masters and auditors, which call for immediate improvement. Others continually arise, on account of the inevitable difference in rate of progress between law and public opinion and for other reasons. But it is not my purpose to-night to dwell upon those needed reforms, which your committees should yearly recommend after systematic and thorough investigations.

My message to you to-night is this: Among the great problems that will test democracy after the war, one of the most vital is the efficient and prompt administration of justice in our courts. Our laws and procedure must be kept responsive to the changing social, industrial, and other complex conditions of a progressive people. To insure that result in Massachusetts, there must be brought home to the people a knowledge, based on careful investigation, of the conditions actually existing in their own state—and then intelligent, concerted effort, supported by the confidence and coöperation of the public, to secure the improvements that will be needed from time to time. Here is peculiarly the task of the Massachusetts Bar Association. You should have a membership including substantially the entire bar of the state, each man doing his fair share of this public duty, and not imposing it upon the secretary and a few other unselfish, public-spirited members. After you determine to earnestly carry on this publicity work, the

best methods of organization and action will readily occur to men of your experience. In order to correct unintentional misstatements and to combat propaganda of misrepresentation, the sacrifice of systematic and constant effort will be necessary. But we must realize, in the words of Chancellor Kent, that "the responsibilities attached to the profession and practice of the law are of the most momentous character. Its members, by their vocation, ought to be fitted for the great public duties of life, and they may be said to be *ex officio* natural guardians of the law, and to stand sentinels over the constitutions and liberties of the country."

THE PRESIDENT. — Ex-Governor Bates, the president of the Constitutional Convention, was expected to be here to-night, but this morning I received a telegram from him saying that it was impossible for him to leave Washington in time to reach Boston at the banquet. With that kindly, accommodating spirit so characteristic of the man, and so many illustrations of which I have seen during the last few months, ex-Lieutenant-Governor Robert Luce has agreed to take the place of Governor Bates, and I now present him to you.

ADDRESS OF HONORABLE ROBERT LUCE.

The explanation of the president will, I am sure, make clear to you why I am not garbed in the habiliments appropriate to an after-dinner speaker, whose sentiments find a reflection in the funereal clothes he is supposed to wear. It may also explain to you why I give you no premeditated speech. Did it ever occur to you that premeditation is an essential factor in a speech of which one has been warned, and also of murder in the first degree? I trust, for this reason, whatever may be the penalty you may award to the judge who has preceded me, or the speakers who are to follow me, that I may be let off with only manslaughter — or on probation, as is happily suggested.

I am to tell you something about the Constitutional Convention, if I am to attempt to fill the shoes of Governor Bates. Were he here, he would speak, I presume, much more from the legal point of view than I shall. I am a member of this Association, therefore presumably a lawyer, although my share in your tasks was not long enough really to earn me that title. I entered the profession somewhat late in life, and my experience reminded me

of the boy who went into a law office, and after he had been there two days was asked how he liked it. "Well," he said, "I don't know; I almost wish I'd never larned law." That, however, was not the reason why I left the profession. I ought to explain that I made a brilliant start. My first employment was before the full bench. That is where I started. And when I got through I was in the position of the young man who started out as a traveling salesman, and after his first trip on the road was asked how he got along. "Oh," he said, "fine, fine!" "Did you sell much?" "No, no, I didn't sell anything, but I made a hell of a good impression." That is what happened after my first and only appearance before the Supreme Bench. And then the people of the state condemned me to twelve months at hard labor after the fashion of my friend Coolidge, the labor consisting in eating a banquet every night and making a speech afterward to pay for it — which is the whole function of a lieutenant-governor in this commonwealth. That disentangled me from the meshes of the law, and since then I have returned to the more accustomed occupation of making it and leaving to somebody else the construing it after I get through.

In my share in the Constitutional Convention it has been my lot to serve with the president of this Association, who has so aptly termed it a catastrophe, with various gentlemen whom I see by me and who are flattering me to-night, for in the convention when I rose to speak it was the signal for them to go out into the smoking room. I imagine that my friend French here, Washburn, and the rest have stayed because they didn't dare leave, but the rest of you have not heard me so often as they have in the last few months and so possibly I may have your attention, even if they go to thinking about other things.

I regret with you very much that Mr. Bates is not present, for he would have brought to you a view of the convention that one who has been on the floor can hardly have secured. It has been our duty to take part in fighting, and in the din and heat of battle we have hardly been able to understand precisely the significance of all in which we have shared. And yet, although but a few days have passed, as I look back on it all I am satisfied that these men to whom you have entrusted this important task have set at work diligently — you may laugh at that — six months for four amendments seem a pretty long time, but you must remember there were one hundred and fifty lawyers in the convention. In spite of their presence we have worked with commendable zeal,

I think, and we have really accomplished much more than the record shows, for we have prepared the way for speedy effort next summer that will count with much more result in much fewer days. Of course this is not the happy time to discuss the details of the work in which we have been engaged. The measures submitted, three of them, have all received the approbation of the people, and so we are three ahead of the record of 1853 anyhow, when nothing was approved. A fourth has received the approbation of a majority of the members of the convention. Possibly it is too delicate a subject for me to enter upon, and yet in all seriousness, although it did not seem to me the remedy for certain ills in the body politic, and although I contributed what little I could to prevent its adoption rather than some other remedy, yet in all seriousness I want to say that even you gentlemen who apprehend the gravest dangers from the initiative and referendum will still find this commonwealth doing credit, I believe, to its people and a service to civilization. For I want to recall to you that it is impossible for any man to predict what will be the outcome of any great change in institutions, and also, with all the seriousness at my command, tell you that unless we are ready for change, unless we are ready to try new experiments, unless we are ready to advance, then will come decay. Benjamin Kidd in one of his books says that all the great reforms in England in the last hundred years were met with the disapprobation of the conservative classes, who finally came to approve them. And so it may be that some of these things that seem to us so dangerous may after all be used by an intelligent people for the common weal. I do not say that in defence of this particular proposition; my own judgment was against it. But if the people should approve it, then let us take this new instrument of government and see if it may not be used for the common welfare.

Is to-day worth living, were it not for to-morrow? I know I am talking to men who have been steeped in the traditions of the past. I know that precedent has been the watchword of your lives, and I want to-night, if I have the power — I want to-night to stir the most conservative body of men in this commonwealth into a recognition of opportunity — aye, more than that, of duty. There are men I see before me who said no convention ought to be held. There are other men who say that no convention ought to come next summer, that we ought never to reconvene; men who believe that the world was completed when they were born; men who believe that nothing more is to be accomplished.

Let me argue with them. Let me, if I can, show why, in my belief, we have been worth while.

I do not say we are great men; I do not know that we are learned or able men. I do know that we are trying to do our duty. Men before us have made mistakes. In the convention of 1820 the finest speech was made by its ablest statesman, Daniel Webster, in defence of property as the basis of representation in the Massachusetts Senate. Is there a man here to-day who will stand and say he thinks that property ought to be represented in government? And in that very convention, Daniel Webster, in behalf of the committee for which he was reporting, represented that there would be no occasion for other methods of amending the constitution than that which was then provided. Already since then conventions have twice assembled and the people have said again and again throughout the land that constitutions are never finished, that constitutions grow as men grow, as everything that is worth while in the world grows.

Recall the reason for the failure of the convention of 1853. Take down Boutwell's Reminiscences and find that one of the two causes he gave why the people rejected its work was because the men of '53, to whom we look back with reverence and respect, compromised on the subject of the election of the judiciary and because they consented to a ten-year term instead of appointment during good behavior. For that reason the people would have none of their work.

Yes, the men of 1820 made mistakes, the men of 1853 made mistakes, and doubtless we shall make mistakes. But shall we for that reason not try — shall we not attempt, if possible, to do something that will bring our forms of government, bring our instruments of government in touch with modern conditions? Aye, but you tell me there are no changes. You tell me that human nature is the same as it ever was. You tell me that this frame of government, devised in 1780, the oldest written document under which men now live, was perfect. It was a wonderful document. All honor to John Adams, who wrote nearly all of it, the greatest statesman Massachusetts ever produced. Credit and glory be his and honor to the men who recognized the worth of his work. Yet remember that John Adams was little more than a young man and a few years before, when youth had been his chief fault, he and Sam Adams and this man whose face you see here, James Otis, the zealots of the day, the reformers of the day, the progressives of the day, the men who said they would

look to the future and not to the past, the men who said there were new doctrines to be preached, new principles to be established — they were the men who stirred America to become the great democracy that should set the law for all the world.

Only the other day down here in one of the churches in the Back Bay a doorway was dedicated as a memorial to a man whose fame had been in eclipse for all these years, who had been mistrusted, feared, aye, hated by the people of Massachusetts; a man who was a great lawyer, a man who was at the head of his profession, who presided over the courts of justice, lieutenant-governor of the Colony, her foremost citizen, and now only honored at last after all these years — why? Because he could not see to-morrow; he could only see the past. He won fame as an historian, he won fame because he knew tradition, he knew precedent, he knew what had happened, but he could not see what would happen. And because he adhered to the past, because he adhered to the crown, because he adhered to everything that was ancient, that man lost the respect, lost the good-will, lost the love of those among whom he lived, and only in future generations could justice be done to his honesty, to his integrity, and to his learning. Forget not Hutchinson, you members of the bar in Massachusetts; in your turn, if you must choose between the past and the future, remember Hutchinson, and choose the path to glory, and not the path to dishonor.

Aye, is there nothing to be done? Are we in our smug happiness and contentment to say that we have perfected governments, that we have done all that we could? Let me rehearse to you some of the problems before you, and let every man ask himself if he has had any share in the responsibility for these things.

At the very moment show me a mile of railroad in this commonwealth that is not either in the receiver's hands or ought not to be there. Show me a mile of street railway in this commonwealth that either is not in the receiver's hands or is not going towards the hands of a receiver. Are you satisfied that you have handled properly the problems of transportation? Does this picture gratify you — you before whom every morning is being flaunted the specter of famine that will stalk through our streets because your railways cannot bring you food? You who are threatened with freezing because your railroads cannot bring you coal, are you satisfied that you have done all that you could for transportation? Or take education. Are you satisfied at this moment that every boy in this state has equal opportunity? Are you

satisfied that the doors of the halls of learning are open to every child fitted to profit by it? Are you making it possible for an Edison or a Bell coming up in the schools of Massachusetts to bring uncounted treasures of wealth to the people of the world? Or again, read the papers from day to day, read the stories of strikes, the stories of conflict between labor and capital; see the safety of the United States threatened because our workers are paralyzing our national industries, and are you content with the record? Do you think there is nothing to be done? Every morning read the story and admit your terrible failure in this great problem of the hour.

And take the question of sanitation. Have you done all that you can in the matter of sanitation? Do you know how many hundreds of young men have been sent away from Camp Devens because cursed with syphilis? Do you know the percentage of men in the Canadian army who have been unable to fight for their country because of that terrible affliction? What are you doing about it? Ah, it is not constitutional to invade personal liberty! Are you responsible? Are you responsible because these hundreds and thousands of young men are being sent home, cursed by a plague that you can stop, if you will look to to-morrow, and not to yesterday?

Or take the list of men who are being rejected upon draft. Are you satisfied with a system of education, a system of social arrangement which is precipitating upon society these hundreds and hundreds of young men who are not even able to fight for their country? Are you satisfied? Do you think you have done all you could for the welfare of your state when you have neglected to make your youth sound in body, spending all your energies, pretty nearly, in attempting to make them sound of mind?

Judge DeCourcy, in his most instructive and encouraging address, has touched upon the question of penology. Why, ten years ago when I was in the House of Representatives it came to my knowledge that one-quarter of all the men you have out here in the Concord Reformatory are defectives — defectives, the euphemism for insanity; another quarter probably so; one-half of your criminals insane and not responsible. And you through your legislature have failed to follow the advice of your experts. You have not segregated those men; you have been unwilling to confine them, but instead you send these wrecks down to Bridge-water and to the other places throughout the state only to be

turned adrift again, derelicts on the ocean of humanity. At any moment one of these defectives may set fire to your property, may meet your wife or your child on the street and do murder or worse. And yet you consent to a system of penology under which there are thousands and thousands of these men at large, ready at any moment to endanger you because you do not dare to segregate them. You do not dare to follow the advice of your experts. Have you done your duty in meeting that problem?

Or take this problem of our own safety. Yesterday that terrible calamity which we cannot comprehend [the explosion at Halifax] came about because some man too late realized danger — because some one human being might have saved that tremendous loss of life. Some one man was responsible. And will you, in your indifference, will you in your lethargy, your sluggishness, your conservatism — will you say, "Somebody else may do it" — "Oh, there is no need to do it"?

Only the other day was it not Admiral Peary who said that any moment a Zeppelin might come overhead? Do you know whether there is a single aircraft gun in Massachusetts? If not, why not? You are citizens of Massachusetts. Why not? The Brockton canal was laughed out of the legislature, ridiculed on every hand; and yet it was only a few months ago that a submarine came across from Germany and sank ships off Nantucket. And yet you have neglected — you have neglected to furnish this simple and easy, even if costly, protection against that menace, so that your shipping may go and come from Massachusetts Bay to Narragansett Bay in safety. Shipping — you who are now trying to get tonnage, to get bottoms that will carry your lumber back and forth, your coal — what have you done about shipping? Ah, you were conservative. You said, "It is not wise for the people to interest themselves in private enterprises. Ship subsidies are a dangerous and rascally invention of those who want to use the money of some people to help others. We will vote against ship subsidies; we will not support any man who favors ship subsidies." Ah, to-day what do you think about it?

Awhile ago I was down in Jamaica, and I was told of a negro parson and given an imitation of his sermon. I wish I could imitate it exactly, but it ran something like this. He was preaching on Noah, and he said:

"Breddren, dar wuz a man named Noah, an' Noah built an ark. Noah said it wuz gwine to rain. De people wouldn't believe him; de people made fun of him, and dey thumbed their noses at him,

but Noah built his ark. And it begun to rain, and it rained and rained and rained forty days and forty nights. De water began to rise and rise and rise. De people went to de top of de hills and Noah went off in his ark. When de water came most to de top of de hills Noah came floating by in his ark where a lot of people wuz, an' Noah stuck his head out de window and dey asked if dey might come aboard, and dey begged and plead. And den Noah thumbed his nose at dem and Noah said, 'Who damu fool now?'

Who is the damn fool now when you have not given your money for the shipping, when you objected to the ship subsidies, when you have opposed all these endeavors in the past to make ready for the present?

What have you done about military training? How many lives are being lost beyond the sea because you said it was needless to have military training, there never would be any more wars, the book of bloodshed had been closed, history had ended, and after this the swords would all be beaten into ploughshares, the spears into pruning hooks, and there would be no more disagreements between nations; we had come to the time of peace on earth, goodwill toward men. No, we would not have our boys brought up to be soldiers. We had not trained them, we had not given the militia the money needed, we would not supply camp equipment enough, we would not make it possible to support the paltry numbers that we had. Now who is responsible for that? I know it is easy to find fault with the past. I am not here to blame ourselves or anybody else for what had not been done. I am simply telling you what has happened, for you are all lawyers, and you will wish to know what has happened that you may tell what will happen.

So I tell you our convention has a great work to do. My only fear is that unless you men awake to the situation, we shall not be able to see the forest for the trees, and in our anxiety for the trivial things of government, little questions of suffrage, and election, and all those temporary matters, we may lose sight of the broad opportunities, the broad duties still before the State of Massachusetts.

When this constitution was written ours was an independent state. I know that since that time the nation has taken over many of our duties. I know that since that time we have sunk into a somewhat subordinate position. But I still think that Massachusetts is a commonwealth; I still believe that we are a unit, that as a commonwealth we have a duty before us of working together for the common welfare, and for that reason I plead with you to remember that while you are citizens of the United States you are

also citizens of Massachusetts, citizens of a commonwealth with great traditions, responsibilities handed down to you which in turn you must carry. Wonderful is the opportunity, tremendous is the need. After this war, competition between nations will be such as the world has never seen—the competition between all forms of social activity. Let us look beyond to-morrow to day after to-morrow, to the time when peace has come, and again we buckle to the battle with the world, the battle of commerce, the battle of industry, and the battle of civilization. Do you think you are going to engage in that fight successfully if you are handicapped and throttled by these forms of the past which we have outgrown? Do you think we are going to be able to succeed in this tremendous competition if we have not made our government efficient, if we have not established the rule that no man shall be in the public service unless he is the best man to be secured for the public service, if we have not established the rule that the head of this great executive organization, this administration, shall have the control over it that every employer ought to have over his subordinates, if we have not given our legislature adequate power? Why, in this convention I was pointed out as the most radical man there. I was pointed out as the most dangerous man there because I proposed an amendment to the constitution of only ten words which won me that—I am willing to call it honor. The amendment said, “The General Court may determine what is a public use.” I need not explain to you lawyers what it meant. It was radical. You all know why it was radical. It meant that you would give your legislature a free hand, give your people, therefore, a free hand to do that which they might think for the common welfare. It would give them the power that the parliament of England has always had, the power under which a great nation, the greatest in the world, has grown up, a power that has never been seriously abused, a power that has developed the finest administrative system in all the constitutional governments of the world, a power that to-day is leading the fight for humanity. That power I ask for the people of Massachusetts, the people of this country—the power to use their utmost strength for the common welfare in order that we may do what our fathers did, make the world safer for democracy.

THE PRESIDENT. — Our next speaker is one of the delegates to the Constitutional Convention and occupies a seat near me, a man to whose words I have listened with very great interest. If we

had a meat dinner to-night instead of a Hoover dinner, I should ask him to speak as he did in the convention on the operation of the beef trust, but I have no doubt he is equally well informed on the fish trust. I present to you the Honorable Charles G. Washburn of Worcester.

ADDRESS OF HONORABLE CHARLES G. WASHBURN.

Mr. Chairman, — Gentlemen of the Massachusetts Bar Association:

I owe it to a very happy accident that I had any notice whatever that I was to speak here this evening. I chanced yesterday, when making my weekly visit to Boston, with my market basket on my arm, to purchase supplies, to walk into the office of a Boston lawyer, and there I saw upon his desk a formidable circular which he called to my attention, upon which I found my name in far more distinguished company than it has ever been before. I was not abashed. You might naturally expect that under these circumstances I would have sent a telegram to the presiding officer saying that, in obedience to the instructions of my physician, I would be unable to come here to-night. On the contrary, recognizing the fact that this is not only the first opportunity I have had, but no doubt the last opportunity I shall ever have to address this distinguished body, I felt that I must insist upon the privilege that was so unexpectedly accorded me.

I am happy in this presence because I believe that this company is safely conservative — not only on a standing vote but, on a roll-call. I would like to submit to the decision of this company some of the great questions that have been considered in the recent Constitutional Convention, one in particular that has been partially decided. There is another tribunal yet to pass upon that question (the initiative and referendum) before it can become a part of our fundamental law.

And now, my friends, there is another reason — I thought I had got started, but I have not yet — just warming up a little. There is another reason why I came here to-night. I was sure of an audience. It is known to many of you that great speeches in Congress, those supposed to hold breathless a crowded house and crowded galleries, are made under far different conditions than those that really exist. They have a habit there which I hope may be indulged in by the convention next summer, of allowing

seven or eight hours, more or less, when any great bill is about to be considered, for general debate. It is upon these occasions when one may get time for the asking, and when no one is expected to remain to listen, that these great speeches are made. One of your fellow-members — I am glad he is not here to-night to contradict anything that I may say — I refer to the sedate, the severe, the austere Sam Powers — made his maiden speech, as I have been told, under these conditions. When he got through he went up to the presiding officer and said, "Well, Mr. Chairman, I did pretty well. There were seven when I began and I have only lost four." Now you see why it is that I roll this sweet morsel of an audience — pardon the figure, but I have gotten started and must complete it — under my tongue with so much delight; why it is that I am making such a confoundingly long introduction to a very short speech. My friends, I have a very small share of that stock of humor which the Almighty in a temporary lapse accorded the Washburn family. I prefer, when I can, to deal seriously with serious questions. Therefore I would not, even if I find it impossible to entirely prevail over a weakness in my blood — I would not too long dwell upon the lighter aspects of this occasion. I realize that you and those whom you represent and your affiliated associations are the molders of public opinion, not only in this commonwealth, but throughout the country. Reference is sometimes jestingly made to the fact of the great preponderance of lawyers in Congress and in our legislatures. To me that is the one certain guarantee that the legislation of the nation and of the state will be considered decently and in order. It has been peculiarly true in this country, from the time that James Otis thrilled the hearts of all Massachusetts men down through to the time of Elihu Root, that the great lawyers of the country have left the most permanent impress upon our history. Where would we be to-day were it not for those great luminaries of the bar and of the bench? Why, very early the battle, which some would even now renew, was fought out against the Courts, and when the impeachment of Judge Chase failed, the independence of the Supreme Court was made secure, the plans of that little cabal of Virginia Republicans, as they were then, came to naught, and John Marshall so construed the Constitution as to give opportunity for the expanding and varying needs of the country.

How little we appreciate the rapid change in conditions in this country! Take by way of illustration one simple clause in the

Constitution, the commerce clause, adopted at a time when there was no interstate commerce and no trade excepting with foreign nations and with the Indian tribes, now that clause includes almost every variety of legislation from the regulation of our great railroad systems to the suppression of the white slave traffic; all this made possible by the judgments of the courts instructed by an enlightened bar.

But while, as you see, I am ready to accord the fullest amount of recognition to the wisdom of the lawyers and of the courts, how little we any of us know of the future! This is a time of epochs. Every day and almost every hour in the day marks an epoch. Direct your attention for a single moment, because there is time for nothing more, to one single example of the shifting of public opinion on a great question. It is not so very long ago, less than fifty years, I believe — that the last spike was driven in the Union Pacific Railroad. The national government had lavished great treasures upon that operation in money and in land, and the road was completed. At that time settlers were tempted by almost every device to take up the unsettled lands of the West. "Give us railroads at any cost," was the national desire; "give us a population in the West." And within a few years — oh, how few! — the cry went up against the abuses of the railroads, and against the indiscriminate grants of public land. Drastic legislation was enacted, some of it beneficent, some of it needed, perhaps some of it unduly restrictive. In 1897 the bar of this whole country was startled by the decision of the Supreme Court which held in general terms that every contract that restrained trade in any way was inhibited by the Sherman Anti-Trust Act.

That decision was handed down in a railroad case twenty years ago, and to-day the Interstate Commerce Commission is suggesting to the country a choice between repealing some of the legislation upon which that decision was based and committing the great railroad systems of the country to the practical consolidation of government control. How quickly conditions change in every phase of our political and industrial and judicial life! This audience, as intelligent as any that can be found in Massachusetts, will, I think, feel that you and I cannot begin to comprehend the changes that are taking place from day to day and from hour to hour. Those of you who have lived through the fifty years of peace since the end of the Civil War have lived through an era the like of which your children and your children's children

will never know. We must, as has been suggested here this evening, adjust ourselves, as best we may, to these new conditions. But in the process there is danger of too rapid change. We must have in the community the progressive — no, I will go further, the fanatic, who is seeking constantly to blaze the path of progress, as he sees it, through the trackless forest of opportunity. But there must be always the conservative sentiment that sees to it that no step shall be taken that will need to be retraced. I speak in the presence of educated men, men who reach their conclusions with deliberation and feel reasonably certain that they are right. But I ask you if, in this supreme hour of disaster for the whole world, when all the furies of hell seem to have been let loose, it is not a time when we should express positive opinions with some hesitation. The wisdom of men has turned out to be the folly of children. The wisest men in the world said this foreign war would probably never come, and if it came, could not long continue. The wisest men in this country said that we could never be involved. We are spending to-day on war more money every twenty-four hours than any nation in the world. We are spending enough to pay for a Panama Canal every eight days. Are these conditions such as to make us thoughtful, conservative, slow to change too quickly? The situation is a difficult one. The progressive of yesterday is the conservative of to-day; the progressive of to-day is the conservative of to-morrow, so rapidly does public opinion change. This should be a time for deep reflection. To what body of men can our citizenship look with greater confidence than to the lawyers of the country to see to it that under these new conditions, under the abnormal situation in which labor finds itself, in the abnormal situation in which capital finds itself, we shall not turn too quickly to the elusive promise of advantages to be gained by material changes in the very fabric of our government?

Gentlemen of this Association, you owe it as a patriotic duty to yourselves, you owe it as a patriotic duty to the citizens of the commonwealth, to participate as you have never before participated in the administration of our public affairs. We pay a price in this world and a different price for every form of government we have. There are, as we so painfully see, advantages in an autocracy. There may be advantages in an oligarchy. We believe that on the whole there are the greatest advantages in a form of democratic government like ours. But are we willing to pay the price? What is it? One is unlimited opportunity for dis-

cussion. Do not cavil at the Constitutional Convention or any other forum, so long as any considerable body of our citizenship wishes to discuss public questions. It is your duty to discuss them, on the stump, in the neighborhoods, in the schoolhouses, and to submit to searching examination every question that is submitted to the people, and not, because of engrossment in your own affairs, to shift the responsibility to other shoulders, weakly hoping that we will somehow muddle through. The message that I bring to you to-night is that of the great duty now resting upon the lawyers of the nation, and in a peculiar degree upon the lawyers of this commonwealth, to aid in the creation of an intelligent public opinion, that great power which makes our laws and often dictates the judgments of the courts.

Hon. W. T. A. Fitzgerald, on behalf of the executive committee of the Lawyers' Preparedness Committee, spoke briefly in regard to the necessity of lawyers taking part in the work of the Legal Advisory Board to aid registrants in filling out their questionnaires in connection with the selective draft.

THE ANNUAL MEETING.

The Eighth Annual Meeting of the Massachusetts Bar Association (adjourned from October 20, 1917) was held in Room 237, State House, Boston, on Saturday, December 8, 1917.

THE PRESIDENT'S ADDRESS.

Members of the Massachusetts Bar Association :

I propose to give you a very informal talk upon a subject of vital and far-reaching importance to the commonwealth, and one which should receive the thoughtful attention of all our citizens, but especially the lawyers. I propose to address you upon the Constitutional Convention of which it has been my fortune, good or bad, to be a member, of the results already accomplished and the results which may be expected from its work when it re-assembles next June.

As is known by all my hearers, on the 28th day of November, after a continuous session from the 6th day of June, the convention voted to adjourn until after the prorogation of the legislature of 1918. This adjournment will furnish the opportunity to some of us, especially those who live in the western part of the state, to return to our respective homes, to renew our acquaintance with our families and neighbors, gather up the wreckage of our business which had gone to pieces by reason of our absence and forced neglect, and to reestablish ourselves in those occupations in which we gain our livelihood, and spend our spare time, if we have any, in laboring with our senators and representatives to secure from the next legislature a further appropriation. Whether the convention will re-assemble in June will depend very largely upon the decision of that question, a very important question to many delegates in the convention.

More than three hundred resolutions have been offered to the convention which the petitioners feel the delegates should consider and discuss and submit as amendments to the constitution for the people's adoption. Many of these resolutions are duplicates, and many of them relate to the same subject matter. All these reso-

lutions have been submitted and considered by appropriate committees, and reports on the same have been made to the convention. A large number of these resolutions were summarily rejected, but there are yet pending more than two hundred resolutions upon which the convention will be expected to act when it re-assembles, many of them very important, many of them extremely unimportant. Those which relate to the more effective and more business-like administration of our state affairs have not been considered. Some of these changes proposed we all recognize as necessary if our state government is to be efficient, and to secure which changes, or in the hopes of securing which, many men voted for the holding of the Constitutional Convention. It is now too late, if it ever was profitable at any time, to discuss the influences which brought about the convention, or to comment upon the indifference of the voters when the question was before them for decision, but it is not too late to consider, and to try to combat, any influences which are sinister, or which, prompted by selfish interests, may endeavor to influence the future action of the delegates. Of the two hundred and more resolutions which are yet to be considered, there are at least twelve relating to the judiciary, the method of selecting judges, whether they shall be appointed or elected, the tenure of judges, and limiting the power of the court in labor disputes.

If there is any one thing that the socialists and other organizations, backed by certain newspapers, desire and are working to secure, it is to break down the power of the judiciary of Massachusetts in labor disputes, in declaring acts of the legislature unconstitutional, and in all matters of controversy between labor and its employers in which the courts are called upon to decide. You learn this to a certain extent from the floor of the convention, but you get the genuine feeling of the delegates as you meet them in the corridor and in the smoking-room.

There is a little matter of history connected with the exemption of the judiciary from the Initiative and Referendum resolution which I feel at liberty to state. The question came to many of us who advocated the exemption — what course shall we pursue? We said, "If the exemption is not made the amendment providing for the initiative and referendum will go before the people with this handicap and the people will not sustain any constitutional amendment which will interfere in the matter of selecting our judiciary or with their tenure of office," and it was the question frequently discussed in conference whether we should vote for it or against it, but it was the almost unanimous opinion that we

should act upon our convictions, in favor of the exemption and discharge our duty to the commonwealth as we saw it, although it was felt that politically the other course might be a wise move.

What will happen next June no one can foretell. The great object of the majority of the convention has been achieved. The other matters like the state administration, the budget, woman's suffrage, prohibition, biennial sessions of the legislature and biennial elections, and a hundred other subjects are apparently of very little importance to the majority in the convention and little time, except by a few especially interested in these subjects, will be given to them. When the convention re-assembles it is possible that some of those resolutions relating to the judiciary, of which I have spoken, will be adopted and submitted to the people on the same ballot on which the Initiative and Referendum resolution, exempting the judiciary, will be submitted.

In addition to the twelve resolutions relating to the judiciary, there are thirty or more relating to what is called social betterment legislation, like old-age pensions, compulsory insurance, the creation of a state fund for workmen, workmen's compensation insurance, the taking of land by cities and towns for homes, the taking over of public utility companies by the state, important questions at this time which demand and deserve careful thought and consideration, not only by delegates in the convention, but by every citizen in the commonwealth, and which the people of Massachusetts will sooner or later have to face and decide. There are numerous resolutions relating to taxation, one of which is of especial interest. It is for striking out of the constitution the requirement that all assessments, rates, and taxes shall be proportionate. In view of the possible adoption of the initiative and referendum, the resolution to make aliens who have signified their intentions of becoming citizens eligible to vote, is a matter of great importance when we remember that nearly one-third of the population are aliens. I mention these resolutions to bring to your attention some of the possibilities and the dangers which are likely to confront us, for they will be pressed with a zeal and unanimity significant as well as powerful. As is known to all my hearers, three amendments have been recommended to, and adopted by, the people at the last election.

There is another amendment, recommended by the majority of the convention, to be submitted to the people at the annual election of 1918 called "the Popular Initiative and Referendum," or, as it is familiarly called, the "I. and R." This amendment

was recommended by a majority of the convention. The last roll-call taken in regard to this matter in the convention was on the question of passing the resolution to be engrossed on November 27, and the vote showed 163 in the affirmative and 125 in the negative, out of a total of 320 elected members of the convention, two of whom had died prior to that time. Of the 318 representatives of the people, therefore, who were entitled to vote upon this question in the convention, the recorded majority in its favor of those voting was 38, 30 members being absent and not recorded at this stage, several of them being too ill to attend that session.

In what I say at this time I want it distinctly understood I speak only for myself; I do not presume to speak for others, much less for this Association, and I would not recommend or advise or approve of the Association taking any action as an Association. But, gentlemen, I do take the liberty of speaking to you as individuals. Have we as lawyers for any reason lost the power and influence which we once had, lost that sense of responsibility to the people which we once recognized? These questions it seems to me are worthy our thought at the present time.

In deciding whether the Initiative and Referendum amendment should be adopted, the real question before the voters is this: Has our constitution broken down? Has the representative republic, based upon the tried and successful principle of representation, so far proved a failure that it is now necessary to destroy, or at least to hazard, this fundamental law, this foundation upon which our government and our institutions were built, and upon which they have rested during these one hundred and thirty-seven years in which Massachusetts has made a record second to no commonwealth in the Union? The leading argument in favor of the initiative and referendum was that the legislature had not been responsive to the will of the people, and did not recognize public opinion and the demands, especially in matters of social welfare which the people thought should be enacted in legislation. We are familiar with the criticisms of the bar made by laymen, and often these criticisms are severe, but the severest criticism of the bar in Massachusetts in the convention was made by a prominent lawyer of this city and the conclusion one drew from his remarks was that the condition in Massachusetts to-day which seemed to require this drastic, this radical and revolutionary amendment was due to the fact that the lawyers of this commonwealth had failed in their duty and had sacrificed the interests of the people to promote the interests of corporations which were

their clients. He even went so far as to speak of the lawyers as "rodents" who had infested the State House because of the "cheese" there to be secured; that while the conditions were better now than in the past, it was due to the fact that the "cheese" had given out, but that they would return when there was a new supply.

If what is said regarding the irresponsible character of the legislature is true, whose fault is it? Who sends to the State House the members composing our legislature? This is a question which deserves the careful consideration of every citizen, and he should seriously ask himself, "Have I neglected my duty as a citizen, have I forgotten in my eager race for money or popularity that I have any responsibility to the society in which I live, or to the government under which I live?" If all that was said in regard to the government of Massachusetts is true, it is for the citizenship to remedy these evils, and I believe the remedy is possible without undermining the foundation principle on which our state government was established. Look at the inconsistency of the Initiative and Referendum amendment. The legislature has been unresponsive to the demands of the public, which public, by indifference, by neglect, or through selfish interest, has been unable or unwilling to select proper representatives to the legislature, men who would honestly endeavor to serve the highest interests of their constituents. The remedy proposed under the initiative and referendum is to put into the hands of this same irresponsible, negligent, or selfish body of people, who are incapable of selecting proper men to represent the best interests of the state, the power of direct legislation. I do not know how my hearers may feel about this. My views are pretty emphatic, but as I said before, I do not claim to speak for any one but myself. The danger in the initiative and referendum is that the mass of the people may vote on the mere name, not on the merits of the amendment itself. It is a very attractive title, "Popular Initiative and Referendum." With so many other interests absorbing the thought of the people to-day, it will be a difficult task to convince the people that they have a duty to perform, to take the time to consider this great and fundamental question and not to vote for a mere name.

Some one has said, "Man does not live by bread alone, but principally by catchwords." This initiative and referendum to many people is simply a catchword, and they will vote for it off-hand unless they can be made to see its many defects and its destructive possibilities. A question so vital, of so much importance, as the changing of the fundamental law and the principles of

government on which the commonwealth was established is a serious question in normal times. But these are not normal times Massachusetts which voted for the convention is not the Massachusetts of to-day; the Massachusetts of to-day is not the Massachusetts which will vote upon this amendment, and much less is the Massachusetts of to-day the Massachusetts which it will be after this nation-wide war is over. When this war closes there will be problems presented to the people of this nation, and of this commonwealth, such as we never yet have had to solve, and in the solution of which we have no precedents to guide us. Take for instance the matter of industrial re-adjustments. Why, gentlemen, if you can judge from the remarks you hear from men on the street, in the shop, and even in the convention, the antagonisms of to-day, and especially the antagonisms between labor and capital, are simply child's play. They will spring up and develop with such intensity as we never yet have witnessed. The uppermost thought in my mind during the time of the sitting of the convention has been "What an inopportune time to attempt to remodel the fundamental law of this commonwealth," to give its very best name.

Massachusetts has very few natural resources. Our life as a state depends upon our manufacturing industries, and a large factor in successful manufacturing is transportation. Transportation, as we all know in Massachusetts and in New England, has broken down. As was well said last night, "Every railroad and railway almost is in bankruptcy." Are we prepared to make a part of our constitution an amendment which will permit all kinds of adverse legislation, put into effect by a few men, by initiative petition. Are we willing to risk the industrial interests of Massachusetts to the uncertainties of a direct and popular vote stimulated by signatures in the manner proposed on questions which demand deliberate and careful and intelligent thought and discussion? This is a mighty serious question, and it seems to me it is time that we awoke to a full sense of our responsibility upon a matter involving so much.

It is claimed that the initiative and referendum is a conservative amendment. You can study it and form your own opinion about that. It is a document of fourteen or fifteen pages, containing thirty-five hundred words, which we are asked to incorporate into the constitution of Massachusetts and, as Mr. Pillsbury said in the convention, "in that amendment we have adopted the worst features of constitution-making ever seen in this country." It is proposed to fill up our constitution with a lot of statutory law and

matters which do not belong in the constitution. The convention seems to have lost sight of the fundamental distinction between constitution-making and legislation. Every amendment offered in the convention looking to safeguarding the rights of the people against evils which might be possible under the initiative and referendum was voted down, emphatically voted down. In the matter of the number of signatures to be secured upon the initiative petition, in the matter of prohibiting paying men to go around and hustle for signatures, the amendment requiring that signatures should be secured in at least eight different counties, were all voted down. On an initiative petition, the promoters of the desired law or amendments of the constitution are not obliged in securing signatures to go outside of counties of Suffolk, Essex, Middlesex, and Norfolk, really placing the rest of the state in the power of the Metropolitan District of Boston, subject to the tender mercies and guardian care of Boston politicians. The rest of the state is not taken into account. The amendment provides for a fixed number of signatures, twenty-five thousand, for a constitutional amendment, less than is required in any other state in the Union except the State of Mississippi. Every amendment to place the number of signatures on a percentage basis as provided in most other states was also voted down.

What I have said has been very informal and disconnected, but the point I have had in mind is this: Recognizing our duty to the community and realizing that we have an influence of weight, if we will but exert it in these coming months, whatever may be our view of the merits of the Initiative and Referendum amendment, we should so exert our influence as individuals and so give our advice that the people when they come to the polls in the November election of 1918 may give a verdict which will be intelligent, thoughtful, well balanced, and with full knowledge and understanding, uninfluenced by passion or prejudice, upon the question they are called upon to decide.

REPORTS OF COMMITTEES.

REPORT OF THE EXECUTIVE COMMITTEE.

To the Massachusetts Bar Association :

The legislative work of the Association during the past year is described in the report of the Legislative Committee, the activities of which were approved by the Executive Committee.

The publication of the Quarterly has been continued, and it may interest the members to know that requests for copies and sets are received from libraries or persons interested from different parts of the country as the publication gradually becomes better known. It is sent regularly to Montreal and to London, and will be sent hereafter to Buenos Aires, Calcutta, and elsewhere abroad. With the gradual, but clearly advancing, work of bar associations all over the country, and of the interest centered in them and the tremendous possibilities which they offer for stimulating and concentrating the hard thinking impulses for public service of members of the profession this publication spreads current information about Massachusetts law and professional problems for the information both of Massachusetts lawyers and of men elsewhere who are interested, as they always have been interested, in Massachusetts and its professional work.

A suggestion received from one member of the Association seems to suggest that the Quarterly, the annual dinner, and every other activity of the Association "should be cut out and all money devoted to the war or charities." While there are probably few members who would go to that extreme, it may be worth while to suggest to the members in general that there has got to be law both during and after the war, that if the bar is to have any interest or influence at all in the discussion and development of the law, in view of new problems of every kind, there must be some method of general communication through an occasional meeting and publication. Without intending in the slightest degree to disparage any and all war and charity work which may be done by lawyers, this Association is not organized for the purpose of doing such work of a general nature. It is a professional body, specifically devoted by its charter primarily, to the purpose of "cultivating the science of jurisprudence, of promoting reform in the law, of facilitating the administration of justice."

These things are perhaps of more essential importance during the war and in preparation for problems after the war than in earlier times of peace, and this Association will fail in its functions if it does not remember the purposes for which it was organized, and confine its activities to that field in which it is best fitted to assist the state, the nation, and, through them both, the American people. The country is full of cant about law and lawyers. Some of it, a good deal of it, comes from lawyers themselves — lawyers in Massachusetts as well as elsewhere. But law is not built upon cant. It is the special function of the bar to think, and when lawyers stop thinking the community suffers. If the serious words used in the charters of bar associations mean anything, they mean that such associations are founded to encourage their members to think *about law* for the benefit of the community. As already indicated the need of such encouragement and of furthering the purposes of the Association by systematic action was never greater than it is in the present times.

A conference of delegates from state bar associations was held in Saratoga Springs in connection with the meeting of the American Bar Association in September. The subject discussed was legal aid societies and their future development. The secretary and Reginald Heber Smith of Boston attended as delegates from this Association, and Mr. Smith contributed materially to the discussion.

Some time prior to the meeting of the Constitutional Convention a suggestion was made by the committee of the Boston Bar Association that a conference should be called of representatives of the different bar associations in the state to consider whether any action should be taken in connection with problems which were likely to come before the convention. The subject was considered at a meeting of the Executive Committee of this Association and the president and secretary were appointed to represent the Association at such a conference. Notices were sent to the presidents of all the bar associations in the state and a conference was held at which most of the associations were represented. After a discussion it was decided that if any action were taken in regard to any matters it should be confined to matters relating to the courts and administration of justice and a committee was appointed to consider and report further. Then war was declared, and after various consultations among members of the committee it was finally concluded that under the circumstances it was not advisable to attempt to take any joint action and no further steps were taken, but the discussion of legal problems before the Constitu-

tional Convention was left to those members of the bar who were interested to appear as individuals before the committees of the convention. Owing to the pressure of war problems, etc., no action was taken by the committees of the Association in regard to matters before the convention. In regard to the proposal for an elective judiciary, however, the secretary, while appearing before the committee of the convention in opposition to such measures *as an individual*, explained that while there had been no action of the Association after the gathering of the convention the Association had always opposed the plan for an elective judiciary for a term of years before the legislature.

FRANK W. GRINNELL,
Secretary.

TREASURER'S REPORT.

Mr. BECKWITH: At the time of the last annual meeting there were 806 active members and 41 honorary members of this Association. Since then 65 new members have been elected, 5 have resigned, 4 died, and 3 have been dropped for non-payment of dues, 2 active members have become honorary members, and 1 member has been reinstated upon payment of dues. We now have 773 active members whose dues are paid to date and 85 who under the provisions of the by-laws will be dropped January 1 next, unless they pay before that time.

A reminder is going out or has gone out this week and without question most of the 85 will pay up.* However, I notice on this list at least one name, the name of a man who is now in France in the uniform, and I think that we ought to take some measures against affronting some member of the Association for non-payment of dues under such circumstances. Doubtless the man was negligent in the early months of the year; very likely he will not get our last notice. And so I think we should save hurting the feelings of a member who may be delinquent because he is abroad in the service of his country.

* Most of them have paid since this report.

The receipts and disbursements are as follows :

Dr.

Amount of balance from last account, October 10, 1916 . . .	\$3,746.40
Received 1 Annual Dues for 1915	5.00
Received 56 Annual Dues for 1916	280.00
Received 772 Annual Dues for 1917	3,860.00
Received for four guest tickets to Annual Dinner	12.00
Received for two guest tickets to Annual Dinner	6.00
Check No. 258 cancelled	10.00
Received interest on deposits to November 25, 1917 . . .	112.45
	<u>\$8,031.85</u>

Cr.

The disbursements which are stated in the report amount to a	
total of	5,401.53
Balance on hand November 30, 1917	<u>\$2,630.32</u>

Our income was between \$4,200 and \$4,300. Our disbursements have aggregated \$5,401.53. We have now on hand \$2,630.32. The disbursements are listed on some dozen pages, but I may explain that of the \$5,400 expended the larger items of expenditure are \$3,800 plus for the Law Quarterly; then the annual dinner cost almost \$400; services of stenographer, stationery, postage, etc., for the Committee of Legislation and the Secretary's office, \$931. The scrapbook which the Association is having built containing newspaper clippings from all the newspapers in the commonwealth on the Constitutional Convention has cost \$112; printing \$70 or \$80. Those are all of the items that are larger than \$20.

The SECRETARY: I would like to say a word or two in explanation of the expenses reported by the Treasurer, which, as you see, exceeded the income. The main reason is that we have had a Constitutional Convention. That fact was the reason why two special numbers of the Quarterly were issued, with a view to furnishing information to those members of the bar who were interested in the problems of the convention. This added materially to the expense of the Quarterly, which ordinarily is intended to come out only four times a year. This year it came out six times. The May number, containing the first part of the history of the court, was a thick number. The item of clerical expense, and so on, is in accordance with the plan which was adopted a year or two ago of providing a stenographer for the Secretary to attend to the general work of the Association. The scrapbook is also an additional expense. It seemed to me when the convention was authorized a year ago that there ought to be compiled by

somebody, and that this Association was the proper body to do it, as complete a scrapbook as possible of the newspaper and leaflet history of the convention. And accordingly, through the News Clipping Bureau, all the clippings from all the newspapers in the state have been coming into my office since November, 1916, and they have been pasted into scrapbooks. I already have a dozen good-sized scrapbooks full and there will be more. I think this scrapbook will probably be the most complete thing of its kind in the state. No book will get everything, but this work is worth continuing until the entire matter of the convention is disposed of, and eventually perhaps it may be deposited for safe keeping with the Massachusetts Historical Society, or some other body of that kind. Usually within a few years after a convention is held all the details are forgotten and it is not until twenty-five or fifty years later that some enthusiastic candidate for a Ph.D. degree spends several months traveling about looking up files of old newspapers to collect the contemporary history and atmosphere of such a body.

These scrapbooks will be valuable as showing among other things the relative amount of space devoted by the different leading newspapers in the state to the proceedings and discussions in the convention and the character of their reports of the proceedings and the manner in which they were presented to the public. This comparative study of the newspaper presentation of the convention during a period of five months is of peculiar significance, both for current consideration and reflection and for the purpose of historical study, for it shows the estimate of practical newspaper men, of the kind and extent of the interest of their readers in the convention and its discussions,* and it has a very

*Those who followed the accounts of the convention in the different leading newspapers during the summer, from June to November, will be interested in the following passage from a volume entitled "A Preface to Politics," by Mr. Walter Lippman, who is one of the most interesting and intellectually honest of the modern writers upon government:

"Hostile critics of democracy have long pointed out that mediocrity becomes the rule. They have not been without facts for their support. And I do not see why we who believe in democracy should not recognize this danger and trace it to its source. Certainly it is not answered with a sneer. I have worked in the editorial office of a popular magazine, a magazine that is known widely as a champion of popular rights. By personal experience, by intimate conversations, and by looking about, I think I am pretty well aware of what the influence of business upon journalism amounts to. I have seen the inside working of business pressure; articles of my own have been suppressed after they were in type; friends of mine have told me stories of expurgation, of the 'morganization' of their editorial policy. And in the face of that I should like to record it as my sincere conviction that no financial power is one-tenth so corrupting, so insidious, so hostile to originality and frank statement as the fear of the public which reads the magazine. For one item suppressed out of respect for a railroad or a bank, nine are rejected because of the prejudices of the public. . . . Anybody can take a fling at poor old Mr. Rockefeller, but the great mass of average citizens (to which none of us belongs) must be left in undisturbed possession of its prejudices. In that subservience, and not in the meddling of Mr. Morgan, is the reason why American journalism is so flaccid, so repetitious, and so dull." (Pp. 196, 197.)

Mr. Lippman's other two books, "Drift and Mastery" and "The Stakes of Diplomacy," are well worth reading for any one in search of a better sense of perspective for the problems of modern democracy.

direct bearing upon the problem of direct legislation now before the people of the state, as evidence of the nature and extent of their understanding of that question.

These are the reasons for the unusually heavy expenses of this year. There is still a reasonable-sized reserve fund in the Association. If the membership can increase, as I hope it will, gradually these things will be taken care of out of annual income. But if we are ever going to make any use of the reserve funds of the Association for the purposes for which we are organized, it seems to me that this past year and the coming year is the best time to do it when it is needed.

THE PRESIDENT: You have heard the report of the Treasurer and the explanation of Mr. Grinnell. A motion is made that the report of the Treasurer, subject to audit* be approved, accepted, and placed on file. The motion prevailed.

MR. FORBUSH: Mr. Chairman, Mr. Beckwith has suggested a possible action in the case of our members who are in the service of the United States. The Bar Association of the County of Middlesex will act on Monday at its annual meeting on the plan that all such members shall have their dues remitted so long as they are in the active service of the United States—military or naval service; and if there is no constitutional provision under which notice has got to be given of any amendment, nothing to stand in the way of such a vote, I will make a motion that this Association pass a similar vote at this time.

THE PRESIDENT: Mr. Grinnell thinks there is nothing in the constitution which prohibits that.

MR. E. A. WHITMAN: Mr. President, I would suggest the omission of the words "military and naval," because I think we have a number of members who are in the service of the United States and away from their practice, not exactly military or naval.

MR. FORBUSH: I am willing to accept Mr. Whitman's suggestion and drop out the "military and naval" so long as they are in the active service of the United States.

The motion as modified was carried.

* The following certificate of the Auditing Committee was later attached:

JANUARY 26, 1918.

We have audited the foregoing account and find it correctly cast and properly vouched and the balance stated of \$2,630.32 was on deposit to the credit of the Massachusetts Bar Association at the date of said account, November 30, 1917.

FRANK M. FORBUSH.
FRANK W. GRINNELL.

Note.

While the by-laws of the Association may not necessarily prevent the action thus taken at the meeting and probably no member of the Association wishes to raise the question, particularly as to the remission of dues of such members as are in the active "military and naval" service of the government, a word may be appropriate in regard to the generous but vague clause which was added covering members "so long as they are in the active service of the United States," a clause which appears to cover civilian service, and as to which no specification of the nature or duration of such service is given for the guidance of the officers of the Association. The clause is so broad that if interpreted as broadly as possible it would remit the dues of men who have been in the civilian service of the United States before the war, and are still in such service receiving compensation therefor, and who have never been considered as exempt from dues on that account. Also unless restricted in its application it might be considered as remitting dues of men who are in active service of the United States on exemption boards or other government work which, while it is a most valuable and patriotic service and is to a considerable extent continuous and unpaid, yet it can hardly have been intended by the Association to cover such service in the vote, for the reason that the practical application of the vote to civilian service of such character, in view of the large number of men in the state performing such service, would so deplete the income of the Association that its work would have to stop to a very great degree for lack of funds. In view of the fact, therefore, that there is no sufficient guide of any kind in the vote of the Association as to the practical application of the vote in regard to the remission of dues, except the original suggestion of Mr. Forbush that it should apply to the "military and naval" service, the treasurer and secretary who are charged with the application of the vote will apply it only to such members as are actually and continuously engaged in the military and naval service of the United States upon receiving notice of such service. They feel that while the remission of dues of such men may be within the powers of the Association under the by-laws, that the broader clause suggested in the discussion was so wholesale and indefinite, however generous, that it cannot be considered as sufficiently specific for application. In this connection also it should be remembered that this Association exists primarily for serious and continuous professional work in the interest of the community — work which is perhaps more important during this period of war than at any other time — and depends

entirely upon the small dues of members for its income, which is necessary in order that this work may be done. Accordingly, it may be a question whether members whose dues might be remitted under the vote at the meeting would really wish that the income and work of the Association should thus be reduced, if they can afford to continue their dues even while in service. The matter must be left, therefore, to those members of the Association in active military and naval service whose circumstances are such that they cannot afford to continue the payment of their dues and notify the treasurer or the secretary of the fact.

F. W. G.

REPORT OF THE COMMITTEE ON LEGISLATION FOR 1917.

To the Massachusetts Bar Association :

The Legislative Committee considered the bills introduced at the session of 1917 in which the Association might be interested, and no action was deemed necessary upon the great majority of them.

The Association introduced and the committee supported the following bills :

In accordance with the vote of the Association the bill revising the system of appeals for police, district, and municipal courts was presented to the legislature. This bill has been discussed in detail in previous sessions and has been before the legislature for several years. As stated in the report of this committee for 1916, it seems apparent that it is merely a question of time when the substance of this bill will be adopted. The only serious arguments which appeared against it are misunderstanding of its provisions and conservative fear of change. Whether the legislature would look more favorably upon the proposal at the coming session is, of course, entirely uncertain, and in view of the war and other problems it may be considered wiser to allow this matter to wait for a year or two before presenting it again.

The Association also supported the bill providing that the requirement of an appraisal to be made by three persons other than the executor, administrator, trustee, or other officer of the court should be in the discretion of the Probate Court, so that the much useless red tape and common and unnecessary expense of three appraisers might be lifted from the burden of an estate, unless the facts or the nature of the property were such as to furnish special reasons for an appraisal in the opinion of the Court. In most cases an appraisal by the executor or trustee

himself, such as may be filed with the tax commissioner, subject to the tax commissioner's revision, would be sufficient. Where there is an estate of sufficient amount to be subject to an inheritance tax the tax commissioner's office makes its own appraisal now, regardless of the probate appraisal, which is thus made a useless performance. It seems also merely a question of time when this measure will be adopted. The legislature, however, did not approve it this year.

The foregoing action was taken with the approval of the Executive Committee.

Also, with the approval of that committee, your committee supported the bills relative to change of investments by trustees under instruments containing no powers of sale. Men are familiar with the absurdity of the existing practice, which makes not only the Probate Court, but the clerks in the transfer offices of corporations the guardians of every trustee in the state, and which resulted in placing the trustee under such an instrument in a position so that he was unable to change investments and protect the interests of his trusts against a falling market, because of the uncertainty of running to the Probate Court to get a special license, and while doing this to find perhaps that the bottom had dropped out of his chance to sell without suffering a serious loss. Several bills were introduced to improve this situation. One of them was passed by the legislature as chapter 155, granting the Probate Court authority, "on petition of the trustees," to license changes of investments, "such authorization or license shall be granted only upon hearing and after such notice as the court may deem proper, *or, in its discretion, without notice, and without the appointment of a guardian ad litem or next friend, and shall remain in force until revoked.*"

This statute improved the situation somewhat. A broader act, however, was also introduced, drawn by Mr. J. L. Thorndike, to relieve the courts and the clerks in transfer offices of their entirely unnatural burden of acting as guardians in the first instance of all trust investments, and transferring that duty from their shoulders to the place where it really belongs, to wit: the shoulders of the trustee who is chosen for the purpose of performing that duty, and who is presumably more competent to do it in most cases than the transfer clerks, or even than the probate judges, who, with all their other duties relating to the administration and settlement of estates, cannot be expected to know as much about all the investments of every trust estate in their jurisdiction as the particular trustees of those estates do. In other words, the intention of the act was to change the artificial presumption in the present rule of

construction and where no powers are expressed, and to substitute the natural presumption in accordance with the natural intention of a person selecting a trustee, that the person thus selected should be a trustee with full powers, unless there are specific provisions restricting him. The bill also contained a broad provision placing the entire responsibility for changes of investments squarely upon the shoulders of the trustee, and relieving the transfer of offices corporations of their duties of guardianship, for which they are not fitted, and relieving the trustees and others of what is not only a serious nuisance, but at times a cause of serious delay and expense in the necessity of complying with every fussy requirement, for reams of waste paper containing copies of document to be filed away without serving any useful purpose except a theoretical protection of the corporation (not the beneficiaries) against fraud, or that somewhat uncertain thing called "constructive" fraud. In these days, when economy of time and money is being preached on every side, it seems a good time to stop the ridiculous accumulation of waste paper, which involves in the accumulation a serious waste of money, which might be devoted to better purposes.

Such considerations satisfied the legislature, and the bill as drawn by Mr. Thorndike passed both the House and the Senate. The third section, however, was drawn in such a manner that it caused a doubt in the mind of the Governor whether it might not be the basis of some claim to immunity by a corporation where it was aware that a breach of trust was going on, and while expressing approval of the rest of the bill, he felt obliged to veto it, because of the phrasing of the third section. As the substantial purpose of the bill appears to have been understood and approved by both the legislature and the Governor, it is believed that the phraseology of the provision which caused the veto can be so improved as to commend itself to both the legislature and the Governor during the coming year. Mr. Thorndike now has the matter under consideration, and we have no doubt that after his new draft has been considered a measure can be agreed upon which will relieve not only the bar, but the beneficiaries of estates and the transfer offices of corporations of a peculiarly annoying mass of red tape, and a very large expenditure of money for which there is such great need in other directions.

The committee has in previous years, with the approval of the Executive Committee, as reported from year to year in this Association, opposed all constitutional amendments proposed to the legislature for the recall of judges or the election of judges for

terms of years. All proposed constitutional amendments were referred to the next General Court by the legislature of 1917 in view of the approaching constitutional convention.

Your committee has taken no action on behalf of the Association in regard to the constitutional convention or any of the problems before it. The position of the Association in regard to such matters is explained in the report of the Executive Committee.

The uniform partnership bill recommended by the commissioners on uniform laws was again before the legislature this year, but was referred to a future legislature, one reason doubtless being that the Judiciary Committee could not readily consider it in this time of war.

In addition to the measures mentioned above the following acts, passed by the legislature of 1917, are likely to be of special interest to different members of the Association :

Chapter 22, relating to probate decrees allowing compromise of wills.

Chapter 42, that after January 1, 1918, notaries public, justices of the peace, and special commissioners when taking acknowledgments shall attach the date of expiration of their commissions to their certificates. This is a directory provision, but, and in order that no serious conveyancing complications could result to third persons because of occasional failures to comply with the act, it is provided that "The provisions of this act shall not affect the validity of any deed or instrument or the record thereof."

Chapter 56, relative to building lines of the cities and towns.

Chapter 62, as follows: that after January 1, 1918 "Every deed which is presented for record shall contain or have endorsed upon it the full name, residence, and post office address of the grantee, and shall also state whether the grantee is married or unmarried. If the statements required are not contained in the body of the deed, but are indorsed upon it, they shall be entered in the margin of the record. *The provisions of this act shall not affect the validity of any deed, and registers of deeds may record any deed not in conformity with the requirements of this act.*"

Chapter 66, that facsimile signatures may be used by clerks and assistant clerks of police, district, and municipal courts on process records, or other legal documents.

Chapter 101, relative to appearances in the Supreme Judicial Court and the Superior Court.

Chapter 109, relative to the tabulation of the returns of votes under the "public policy" act of 1913.

Chapter 126, to enable the Probate Court to determine questions arising from the omission of children in wills.

This act seems unnecessary, as the previous statute which it amended was as broad as the English language could make it, and this act adds nothing except possible confusion some day.

Chapter 163, relative to prosecutions or proceedings for the support of minor children.

Chapter 168, amending chapter 292 of 1916, relative to the practice of law by incorporated collection agencies or adjustment bureaus.

Chapter 171, to empower the tax commissioner to gather information relative to the value of real estate.

Chapter 206, to provide that the Supreme Judicial Court shall by a rule or special order direct in what manner and to what extent records of litigation shall be extended.

Chapter 213, relative to liens for labor and materials.

Chapter 227, requires clerks of courts to give notice of defaults in actions at law and of certain decrees in equity.

Chapter 267, "An Act to Prohibit the Soliciting of Certain Legal Business by Persons not Attorneys-at-Law. *Be it enacted as follows:* It shall be unlawful for any person, not being an attorney-at-law, to solicit for himself or another, from a person accused of crime or his representative, the right to defend the accused person. Violation of the provisions of this act shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than six months, for a first offense, and by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, for any subsequent offense."

Chapter 268, relative to certain duties in determining the value of a corporate franchise for taxation.

Chapter 279, to revise the laws relative to partition of real estate. This act was the result of the work of the special commission dealing with this subject (House Doc. 1638 of 1917).

Chapter 296, relative to sales of real estate for distribution.

This act is intended to meet the practical situation discussed by the opinion in *Giles v. Kenny*, 221 Mass. 262, and discussed in the report of the Committee on Legislation for 1915, pages 63-73. This act also resulted from House Doc. 1638 of 1917.

Chapter 297, relative to the settlement of claims under the Workmen's Compensation Act.

Chapter 302, annexing certain towns to the judicial districts of various courts.

This act provides that "The jurisdiction acquired by any court under the provisions of section one shall, in all towns which now or hereafter have a trial justice resident and holding court therein, be exclusive of such trial justice only as to matters without the jurisdiction of a trial justice, and concurrent with the trial justice as to all matters within his jurisdiction." This act is a result of the discussion whether the office of trial justice shall be abolished, which has gone on during the past three years and as to which a special commission sat during 1916.

Chapter 303, relative to the distribution of intestate estates (as to this see House Doc. 1638 of 1917).

Chapter 306, relative to the sale of estates subject to remainders (as to this see House Doc. 1638 of 1917).

Chapter 307, relative to the taking effect of certain orders, rules, and regulations of commissions, boards, or officials vested with the power to make them.

Chapter 309, relative to the sale of real estate of deceased persons (as to this see House Doc. 1638 of 1917).

Chapter 310, to authorize the homestead commission to provide homesteads to citizens.

Chapter 326, relative to the appointment, compensation, and jurisdiction of trial justices.

Chapter 342, to provide for the better defence of the commonwealth in time of war.

"Section 6: Whenever the Governor shall believe it necessary or expedient for the purpose of better securing the public safety or the defence or welfare of the commonwealth, he may with the approval of the council take possession:

(a) Of any land or buildings, machinery or equipment.

(b) Of any horses, vehicles, motor vehicles, aeroplanes, ships, boats, or any other means of conveyance, rolling stock of steam or electric railroads or of street railways.

(c) Of any cattle, poultry, and any provisions for man or beast, and any fuel, gasoline or other means of propulsion which may be necessary or convenient for the use of the military or naval forces of the commonwealth or of the United States, or for the better protection or welfare of the commonwealth or its inhabitants. He may use and employ all property so taken possession of for the service of the commonwealth or of the United States, for such times and in such manner as he shall deem for the interests of the commonwealth or its inhabitants, and may in particular, when in his opinion the public exigency so requires, sell or distribute gratuitously to or among any or all of the inhabitants of the commonwealth anything taken under clause c of this section and may fix minimum and maximum prices therefor. He shall, with the approval of the council, award reasonable compensation to the owners of any property of which he may take possession under the provisions of this section and for its use, and for any injury thereto or destruction thereof caused by such use."

This statute is interesting in connection with the recent constitutional amendment adopted on November 6, 1917, and the discussion of war powers under the Constitution of the United States by Hon. Charles E. Hughes, reprinted in II. Mass. Law Quarterly, page 575.

Chapter 345, amending R.L., chap. 173, sect. 105, as amended by St. 1910, chap. 555, sect. 5, by adding the following:

"A justice of the Supreme Judicial Court or of the Superior Court may, upon request of the parties, in any case where there is agreement as to all the material facts, report the case to the full court for determination without making any decision thereon."

So far as the Supreme Judicial Court is concerned, this statute appears to be surplusage, for as explained by Chief Justice Gray in *Mass. Bank v. Bullock*, 120 Mass. 86, where the parties agree upon a case stated, which is filed in the clerk's office, it, thereby,

comes automatically before the full bench without any report or action of any kind by the single justice.

Accordingly, this act merely provides that a single justice may add his report, if he wishes, although the case goes up automatically without it.

So far as the Superior Court is concerned, it gives that Court a somewhat broader, but uncertain power to report cases, as shown by the note attached to this report.

A bill was introduced into the legislature by the New Bedford Bar Association with a view to prohibiting certain practice of persons who are not members of the bar in holding themselves out as conveyancees, or otherwise in ways which might not be covered by the existing statutes. Your committee considered this matter with some care and was divided as to the advisability of the measures as presented, while appreciating that certain abuses exist which are difficult to deal with. The position of the committee was explained to the committee of the legislature.

Whether some statute can be drawn which is likely to do more good than harm, your committee are still uncertain. The matter deserves serious consideration, but the drafting of such a measure is a difficult problem.

A bill was introduced to add the action of "deceit" to the list of actions which now survive under R.L., c. 171, § 1. Your committee approved of this plan, but it did not pass the legislature. Mr. J. L. Thorndike is preparing a redraft of such an act, to include "deceit," and actions "in respect to real or personal property," with a carefully prepared explanatory note, showing the more liberal rule elsewhere. This draft has been submitted to the legislature of 1918. This draft also provides that it shall apply not only to future, but to pending actions, following in this respect the language of the acts of 1828 and 1834, which enlarged the classes of actions that survive. If the act is passed by the legislature, Mr. Thorndike's explanatory note will be printed in the Quarterly, as has been done with previous acts in previous numbers, for the information and convenient reference of the bar.

Respectfully submitted,

FRANK F. DRESSER,

Chairman.

NOTE ON ST. 1917, C. 345, AS TO REPORTING CASES.

While this statute was under consideration by the legislature the suggestion was made by the Senate draftsman (Wm. E. Dorman, Esq.) that if it was to be passed the words "where there is a case stated" or "where there is a case stated by agreement of the parties" should be used instead of the clause "where there is an agreement as to all the material facts." The reason for this suggestion was that the words "a case stated" had a distinct and recognized meaning and was the phrase used in section 5 of chapter 716 of 1913.

In *Frati v. Jannini*, 226 Mass. 430, at page 431, the Court speaking through Chief Justice Rugg said:

"There are three ways in which a case at law may be presented for decision on its merits. One is by the introduction of oral and documentary evidence in the ordinary way, which results ultimately in a verdict if the trial is had before a jury, or in a finding if the trial is had before a judge. The second way is by an agreement of the parties as to the evidence which shall be considered by the Court or jury. In such instance the agreement merely takes the place of the evidence which otherwise would be introduced in the usual way, and either the jury renders a general verdict or the judge makes a general finding founded upon that evidence. The third way is for the parties to agree upon all the material ultimate facts on which the rights of the parties are to be determined by the law. The accurate phrase to express this way of presenting a case is 'case stated,' although not infrequently the words 'agreed facts' or 'agreed statement of facts' are used. This course leaves no room for inference (unless and except as modified by St. 1913, c. 716, § 5). . . .

"Often a difficulty of construction arises to determine whether on the one hand, the document stating facts is a 'case stated' or whether, on the other hand, it is merely a part or the whole of the evidence in the case or a statement of agreed facts submitted as *evidence* from which by inference or otherwise the ultimate facts are to be deduced. . . . The determination of that question when it arises must be made on the substance of the thing done and not upon the name or description applied to it. That question assumes importance now by reason of St. 1913, c. 716, § 5, whereby it is provided that inferences of fact may be drawn

on a 'case stated' unless parties expressly agree to the contrary.

"It has been held before the enactment of St. 1913, c. 716, § 5, that upon a 'case stated' no inference of fact could be drawn, and unless as matter of law the plaintiff was entitled to prevail, judgment was entered for the defendant. . . .

"If the agreed facts are submitted to the tribunal merely as evidence and in place of ordinary proof, then that portion of that statute does not apply, and the case stands as does any other case at law coming by appeal or report from the decision of the trial judge."

Accordingly, it was suggested that unless it was made clear that the act related only to a case stated by the parties for the opinion of the Court, the Act of 1913 would not be applicable to the case reported, and therefore it would be necessary to include in the "material facts" all inferences of fact, because such inferences are facts, as shown by such cases as *Friedman v. Jaffe*, 206 Mass. 454, and *Berton v. Atlas Assurance Co.*, 203 Mass. 134.

The suggestion, however, was not followed, and some of the confusion arising from the language of the statute is shown by the first case reported under it (*Atlantic Maritime Co. v. Gloucester*, decided December 4, 1917, *Banker and Tr.*, December 22), in which the Court held that the report must be discharged as not authorized by "the instant statute." The Superior Court had reported the case upon what was entitled an "Agreed statement of facts submitted as evidence," and, in the opinion of the full court, the rules as to cases stated by the parties for the decision of the Court are again stated and the difference pointed out between them and admissions of facts and agreements as to evidence which require a further finding of facts by the Court.

The previous statute (R.L., c. 173, s. 105) allowed a report after verdict, or after a finding of facts by a judge. As a case stated by the parties has been described as "somewhat in the nature of a special verdict" (*Old Colony Railroad Co. v. Wilder*, 137 Mass. p. 537), and the full court gets no assistance from a preliminary decision of a single judge without giving any reasons, there seems to be no reason why he should not have power to report the case in the same manner as he might do if he had found the facts himself as stated by the parties. One object of allowing such reports is to get rid of the presumption in favor of one of the parties that would follow from a decision of the judge (*Boston Lodge v. Boston*, 217 Mass. p. 177). This would be accomplished

simply by adding in s. 105 of the Revised Laws (c. 175) the words "or upon a case stated by agreement of the parties for the decision of the court," and all the existing provisions relating to such cases would then apply. But under the recent act of 1917, if a case stated is reported, no inferences of fact can be drawn, because the act does not authorize a report unless there is an agreement as to "all the material facts," and these include inferences of fact (*Friedman v. Jaffe*, 206 Mass. 454). Yet if the judge had entered judgment one way or the other upon the same case, and the party against whom he decided had appealed, the full court would draw proper inferences of fact under St. 1913, c. 716, s. 5. It is undesirable that the effect of a case stated should be so different according as it was carried up by report or by appeal, and it is to be hoped that the matter may be set right by the commissioners in the consolidated statutes.

F. W. G.

REPORT OF COMMITTEE ON GRIEVANCES.

The committee has held nine meetings during the year, always with a quorum present and with an average attendance of more than a majority.

Seven complaints were brought forward from last year and fifteen new ones received, which were of sufficient importance to be considered by the committee.

Besides these matters many of the usual attempts to use the committee as a collection agency, and frivolous and unfounded complaints have been disposed of by the Secretary.

Two matters are now pending. All others have been disposed of.

Harry N. Sayward of Ipswich was notified to appear before the committee to answer to several complaints. He did not do so and the committee recommended disbarment proceedings. These have been duly authorized and carried through, a decree of disbarment being made by the Superior Court this week.

Several complaints were dismissed upon evidence that they had been previously considered and disposed of by local bar associations.

A number of hearings, in one case extending over two days, were held by the committee, resulting in dismissal in each case.

A sub-committee of three made a day's trip to an outlying county, held hearings at the county seat and a near-by town, and reported back to the main committee.

While the attorney admitted his dilatory and careless methods, it appeared that the complainants had all been satisfied, and were at the time more disposed to help out the attorney than the committee. The accused promised to abandon all collection business, and assured the sub-committee of his future good conduct.

Under all the circumstances, the committee voted to place the complaints on file and to keep with its records a transcript of the evidence taken.

A matter referred to us by the Executive Committee relative to a divorce which had evidently been obtained upon perjured testimony was promptly investigated. Counsel for libellant voluntarily appeared before the committee and made a very full and frank statement as a result of which the committee were entirely satisfied that he had been entirely misled by his client, and they unanimously exonerated him from all suspicion of improper conduct.

The recent reports of improper conduct of attorneys in connection with attempts to obtain the discharge of drafted men led to proffers from the President and Secretary of the Association and from this committee of our services, if desired.

As a result a conference was held with the chairman a few days ago by Lieut.-Col. Massee, Judge Advocate General at Camp Devens, and Theodore Hoague, Esq., Secretary of the Committee on Grievances of the Bar Association of the City of Boston.

It developed that two of the lawyers offensively active in such matters were residents of New Hampshire and Rhode Island respectively, and that a Boston man complained of was not a lawyer.

The practices complained of are evidently systematic and widespread, resulting in swamping the Judge Advocate's office with bulky affidavits and other papers, practically all of which are unnecessary, and they are evidently designed and intended to impress the "clients" with the great value of the services rendered. Extortionate fees have been charged in these matters in many cases, and the number of applications for discharges has been enormously increased.

Lieut.-Col. Massee stated that the intervention of a lawyer was harmful rather than helpful and added complications and delays; and all that was necessary in such matters was for the drafted man to bring his case to the attention of his office, and it would be thoroughly and properly investigated and passed upon.

In closing this report, I desire once more to express my deep personal appreciation of the interest taken in this often unpleas-

ant work by my fellow members, and especially of the large amount of time and effort devoted by the faithful and efficient Secretary, Stoughton Bell, Esquire.

Respectfully submitted,

FRANK M. FORBUSH,
Chairman.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

To the Members of the Massachusetts Bar Association :

The Committee on Legal Education has taken no action. One year ago the committee made a similar report, saying: "We deemed it better to remain quiescent until a change in conditions gave promise of useful action on our part." Your committee this year was convinced that no such change in conditions had taken place, and that the time was not yet ripe for action.

Respectfully submitted,

FRED T. FIELD,
Chairman.

REPORT OF SPECIAL COMMITTEE OF MAJORITY VERDICTS.

To the Massachusetts Bar Association :

The committee selected by the President of the Association, to report as to the desirability of a change in the law from the present rule requiring unanimity in the verdicts of juries to that permitting a verdict by a majority, begs to submit its report.

The time necessarily consumed in correspondence in and out of the state delayed the report until after the annual meeting of 1916.

The subject seemed to consist of two distinct inquiries.

First, there is the consideration of the present situation in Massachusetts. Is there such substantial inconvenience or injustice in the present system as reasonably to require a change?

Second, what is the experience in those states of the Union where majority verdicts are lawful?

1. THE SITUATION IN MASSACHUSETTS.

It would seem to be settled here that there is no great call for a change in the present rule. The Constitutional Convention dealt with the subject during the last summer, and it was then decided to leave the matter where it has been heretofore.

An inquiry by your committee was made of all the clerks of courts in the state for definite figures for the last full year, that of 1916, as to the percentage of disagreements in the cases tried to juries. The result is most interesting. In six of our counties, namely, Barnstable, Berkshire, Bristol, Dukes County, Hampshire, and Nantucket, there were no disagreements at all. The number of cases tried during the year 1916 in those counties was respectively as follows: Barnstable 14, Berkshire 44, Bristol 122, Dukes County 6, Hampshire 10, and Nantucket none.

Turning now to the counties in the state in which there was a much greater number of jury trials during 1916, the result is almost equally interesting. They are as follows:

Essex	..... 246 trials	..... 7 disagreements	..... i.e., 2.8%
Franklin	..... 28 "	..... 1 "	..... " 3.5%
Hampden	..... 114 "	..... 3 "	..... " 2.6%
Middlesex (Oct., 1915, to Oct., 1916)	..... 398 "	..... 7 "	..... " 1.8%
Norfolk	{ 106 civil trials	..... 2 "	..... " 1.88%
	{ 37 criminal trials, 1	..... " 2.7%	
		or an average of 2.1%	
Plymouth	..... 98 trials	..... 4 "	..... i.e., 4.1%
	{ 563 trials	..... 26 disagreements (in gen. session, civil)	
Suffolk	..... 211 "	..... 4 disagreements (in spec. session, civil)	{ " 3.1%
	..... 332 "	..... 4 disagreements (in criminal session)	}
Worcester	{ 119 civil trials	..... 8 disagreements	..... " 5.1%
	{ 114 criminal trials, 4 " }

The general average percentage for the state from these figures for the year 1916 is 2.8 per cent.

It might be urged with some force that in 2.8 per cent of 2,562 jury trials of all sorts the opposing sides might be so evenly balanced, as the evidence actually appeared, that jurors of the best quality might be expected to take divergent views, and indeed that a disagreement might not be an incorrect solution.

It would seem then that the experience of Massachusetts during 1916 at any rate did not indicate a cogent reason for changing a time-honored system. An inquiry of the clerks as to the desirability of a change in their opinion elicited answers indicating

that the clerks of Barnstable, Berkshire, Nantucket, and Plymouth thought well of a change to a majority verdict, say of 9 to 3 in civil cases, while the clerks of Essex, Franklin, Hampden, Hampshire, Middlesex, and Norfolk were averse to any change from the present rule.

It is only fair to say that the advocates of a majority verdict system contend that a compromise verdict works injustice, even where the record does not show a disagreement, and they claim that that is a reason for a change in the system.

2. THE SITUATION OUTSIDE MASSACHUSETTS.

Your committee cannot contend that a thorough canvass of all the states was made for opinions on the question. Correspondence was had, however, with lawyers of known character and experience and (in many cases) of eminence, in most of those states having the majority verdict. The general opinion of the bar and the public in Colorado, Idaho, Illinois (where the old rule prevails, by the way), Ohio, Missouri, Montana, Oregon, Utah, and Washington is stated by our correspondents (taken so far as this question is concerned quite by chance) to be favorable in civil cases to the majority rule of 10 to 2 or 9 to 3. The usual reason stated is the familiar one that one or two eccentric characters under the majority rule are not able to prevent a verdict. Their experience apparently has not suggested any new, unfamiliar, and compelling argument.

The result is that the old system in Massachusetts seems to work well and to require no change, and in those states where the change has been made it seems to be quite as satisfactory to the profession and the people. It might be said that the important thing is to have a system and follow it.

If it be of consequence, a majority of your committee, consisting of Mr. Hannigan and the Chairman, believe in the present system and are opposed to a change to the majority verdict, while Mr. Bates thinks that a change to a 10 to 2 or 9 to 3 verdict would be an improvement, believing the practical and common-sense method of majority rule which applies in every other commercial or judicial tribunal, including our United States Supreme Court, is more in accord with present day ideas, and the reasons for its adoption are stronger than the sentimental or traditional reasons advanced in behalf of a retention of the unanimous jury system.

THOMAS W. PROCTOR, *Chairman*.
JOHN E. HANNIGAN.
SANFORD BATES.

DISCUSSION OF THE CONSTITUTIONAL AMENDMENT RELATIVE TO STATE OR MUNICIPAL TRADING IN NECESSARIES.

The PRESIDENT: The subject announced for discussion this morning relates to the effect of one of the amendments which was submitted to the people by the Constitutional Convention and ratified as the Forty-seventh Amendment, as follows:

"The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency, or distress, of a sufficient supply of food and other common necessities of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine."

Mr. GRINNELL: Merely to start things I will say a few words about this, although some of you gentlemen here who sat in the convention know more about it than I do. My familiarity with it is merely that of a spectator from the gallery.

This question came up in the convention on a number of different propositions for municipal and state trading of every form, and the committee, after preparing several drafts, submitted the following:

"The commonwealth may by statute duly enacted authorize the taking by purchase or otherwise of foodstuffs, feeds, fuel, ice, and other necessities of life, paying reasonable compensation therefor, and the sale of the same to the inhabitants thereof, and to any county, city, town, or other municipal corporation therein; the Governor, with the approval of the council, if he deems that a public exigency exists, may, until otherwise provided by law, exercise the powers hereby granted. The commonwealth may, by statute duly enacted, authorize municipalities to buy and to sell to their inhabitants the necessities of life, and to harvest and to manufacture ice; and may also in like manner authorize the establishment, maintenance, and operation by the commonwealth and by cities and towns of markets, docks, fuel and coal yards, elevators, warehouses, canneries, slaughter houses, and other like means for collecting, converting, selling, and distributing the necessities of life."

Of a series of drafts, that was, I think, the one on which the main controversy took place. After discussion it was voted to substitute the amendment, which was passed to be engrossed, reading:

"The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency, or distress, of a sufficient supply of food and other common necessities of life and the providing of shelter, are public functions, and *it shall be the duty of* the commonwealth and the cities and towns therein to take and to provide the same for their inhabitants in such manner as the general court shall determine."

After it came back from the engrossing clerk, on motion of Mr. Dresser of Worcester, the rules were suspended by a two-thirds vote and the words "it shall be the duty of" were struck out and the permissive word "may" was substituted, so that now the amendment as drawn is a grant of power to do things and not, as it read in the previous draft, apparently a mandatory instruction to every city and town in the commonwealth to do these things. And the question is, what the legal effect of this amendment is. As to that men in and out of the convention, I think, differ, and probably will continue to differ. I do not know that any one has had an opportunity to make any very exhaustive study of the provision or its history. I certainly have not and so what I say is merely for the purpose of giving you some of the facts and perhaps bringing out questions which will lead to further discussion.

I have a letter from Mr. Frank F. Dresser, a delegate to the convention, in regard to this matter and as he could not be here I will read what he says:

"On the Public Trading Act my belief has been that the state has power to commandeer supplies to protect its people from starvation or distress, just as full power in that respect as it has to protect us against epidemics or violence. If a state because it is a state has not that power, there is no use in government. But a state does not have power to interfere in such matters where the reason for interference is that supplies may possibly be obtained cheaper. In other words, if boots are a necessity the state may get and give or sell them, but if boots are merely unduly high in cost, but can be reasonably obtained, the state has no power to take measures to reduce the cost. The amendment

which was passed in my opinion confers no greater power than the state already had.

"That was not, I take it, the opinion of the convention, else nothing would have been adopted. Some of us thought that way but the radicals thought that it allowed better trading, and so for once the two wings voted together.

"You will recall the debate about the insertion or use of both words, 'exigency' and 'emergency.' I always felt that they meant the same, the only difference being, perhaps, the element of time or suddenness. You will also recall that the draft was amended at the eleventh hour by striking out 'that it should be the duty of the state.' That did not change the substance of the measure or limit the power, but did prevent a possibly difficult legislative situation. The Court, if their opinion were asked, would say that we were in fact at war and that we must perform the mandatory duty of taking some measure although the proposal might or might not be wise, as to which the Court would express no opinion; the effect, however, would be that something or other would certainly have passed. Under the amendment as it stands, however, the legislature is not under that imperative duty and may use its discretion, and it seems to me that the amendment adds nothing to the previously existing power, but simply removes doubt as to its existence."

There are several members of the convention here, so that I cannot teach them anything about it. The only thing that it has occurred to me to call to your attention is a historical discussion in the tenth volume of the publications of the Colonial Society of Massachusetts, a paper read in 1905 by Mr. Andrew McFarland Davis on "Limitations of Prices in Massachusetts, 1776-1779." That may contain some historical information in regard to this sort of thing, during the hard times and inflated currency of the Revolution, and just before the present constitution was adopted, of interest in this connection. The opinion of the justices in regard to public coal and wood yards in 1903 (182 Mass. 605) was commented on in the convention debate. That was an advisory statement of the opinions of the individual justices, given at the request of the legislature without hearing argument. It was not a decision of the Court.*

* In the recent case of *Jones v. City of Portland*, decided December 10, 1917, 38 S.C. Rep. 112, the constitutionality of the following statute of Maine had been questioned in a tax suit before the Supreme Court of that state:

One question is how far the words "emergency," "exigency," create a legal situation or merely a legislative one. I think the general idea in the convention was that the word "emergency" was ultimately a legislative question, just as the word "exigency" is, and that the series of words used to describe the occasion under which this power might be exercised are emphatic indications to the legislature and the municipalities that it is not intended that the state and all the towns and cities shall go into general business, but that it is really a power which is for unusual use and that the determination of that question is rather a legislative one than a legal one.

The Court has decided, if I remember correctly, that the question whether and when a public exigency exists for the exercise of powers under the existing constitution is ultimately a legislative question, and how far these other somewhat general facts enumerated and described in this short sentence add to or alter that question and whether the Court is mixed up in it, is one of the problems. (Cf. *Miller v. Fitchburg*, 180 Mass. at 37.)

Mr. FRANCIS N. BALCH: I think the political history of this amendment in the convention throws a little light. I have only a few words to say on it. I shall not attempt any detailed review of what happened. At the same time I think the whole community ought to understand what it was that happened, as you do, sir [to President Hibbard], and as does every man who was a

"Any city or town may establish and maintain within its limits, a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants. The term, 'at cost,' as used herein, shall be construed as meaning without financial profit."

The Supreme Court of Maine decided that the statute was not beyond the legislative power.

The case was then taken to the Supreme Court of the United States on the ground that the statute was in violation of the Fourteenth Amendment, because the purpose of the statute was not a public purpose, and the Supreme Court in a unanimous opinion, speaking through Mr. Justice Day, said:

"Bearing in mind that it is not the function of this court under the authority of the Fourteenth Amendment to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

"We see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a state authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the state to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Judicial Court of Maine must be affirmed."

member of the convention. You must remember that one of the few convictions this convention had at the time this measure came before it was that it was politically wise for it to do something on this measure at once and in time for the November election; and you must remember that the committee in charge had brought in a complicated report, dealing with the question, on which they themselves differed — a badly split committee — and that report had resulted in a very fierce, long drawn-out debate, and the radical and conservative elements in the convention were on the whole rather more bitterly split on this measure than they were even on the I. and R. Then the committee brought in a fresh draft almost every day, filled with fresh technicalities, till most of the delegates became completely confused and impatient. Then Mr. Lomasney, with his usual skill in compromising, saw his chance and threw overboard the long, involved, technical language of the committee, with much in it that was good and much in it that was very questionable, and substituted instead the simple-sounding, but vague and ambiguous measure which finally passed; that is, in substance. Now Mr. Lomasney got that through the convention for the simple reason that one fraction of the convention voted for it believing that it meant one thing, while the other fraction voted for it believing it meant diametrically the opposite, and consequently both fractions were for it. It was a very simple political dodge and it worked to the queen's taste. The words on which the controversy turned were the words "exigency" and "distress." The whole argument raged around those words. There was one element in the convention, typified perhaps by Mr. Harriman of New Bedford, who took this point of view with regard to the word "distress." They said that every day of every year is a time of "public distress," for the reason that the wages of an unskilled worker are only \$12 a week and on that he cannot marry and raise a family without actual distress, and at the present time he cannot get himself sufficient clothes and coal to keep warm, he cannot get sufficient food to keep his children going. Consequently, in their view, the measure is going to open the door to the legislature on every day of every year to provide fuel, food, clothing, housing, and whatever else is needed to relieve distress. They are perfectly frank about it, and it was on that interpretation of it that they voted for it. They are perfectly willing to say that in private. I think they would say it in public. And so of the word "exigency;" they say, although it is coupled up with "emergency" here, yet the Courts have declared that the word "exigency" is synonymous

with "convenient" and it means nothing more than "convenient;" and whenever it is "convenient" for the state to furnish people what they want at the expense of those who pay the taxes, it is now going to be competent for the state to do so. For myself I don't know what the amendment means. I know that I tried to get the delegates to declare what they meant it to mean by offering the following resolution after the bill had passed:

"Resolved, That it is the sense of this convention that the article of amendment authorizing the enactment of laws governing the acquirement, sale, and distribution of the necessities of life, was intended for emergency use only, to wit, in abnormal times or circumstances; and that it was intended the legislature should be the sole judge of the existence of such times or circumstances."

That was promptly laid on the table, on Mr. Lomasney's motion, and while it could have been taken from the table at various times thereafter, I never moved to do so until the end of the convention, and then only to kill it myself, withdrawing it by unanimous consent, because I found that the radicals did not want it for the reason that they knew they would be beaten on it, while as to the conservatives, some of them did not want it because some of the more timid thought that they might be beaten on it—they would not have been, but they were afraid they might be—while some of the best leaders on the conservative side were unwilling it should come to a vote, because they thought it contained an admission, or would if adopted involve an admission, that the convention had passed a measure without knowing what it meant. And they thought the convention ought not to admit its own shortcomings publicly in this way. That did not appeal to me personally, but as one of the juniors in the convention I gave way to my elders. It seemed to me it would be better for the convention to be frank about it and state what interpretation it put upon its own words, even if that involved a damaging admission as to its own conduct; but that was not the opinion of some of the men to whose experience I deferred. Consequently, there is nothing in the records to show whether the convention meant this to be a strictly emergency power, for use in abnormal circumstances only, or whether they meant it to be a general power available in normal times. Also there is nothing to show whether the convention meant the legislature to be sole judge of the emergency, or whether they meant to

have that reviewable by the Courts. But I think no unprejudiced observer of the convention could dispute that a very considerable majority believed they were passing a strictly emergency measure, with the legislature, however, as the sole judge of the existence of the emergency.

MR. CHARLES NEAL BARNEY: May I ask the gentleman who has just spoken, who says it seemed to be the opinion of the convention that this allowed free distribution to persons in want of the necessities of life, what meaning the convention attached to the words, "distribution at reasonable rates"? I had assumed that this provided for the sale by municipalities and not for gifts.

MR. BALCH: That was so. It was not intended that these "necessaries" should be distributed as out-and-out gratuities. But what "reasonable rates" meant in the minds of the members of the convention, it would be difficult to say. Some interpreted it as meaning such price as the recipients could afford to pay. Others wished to change it to "at cost." But it was pointed out that if that was done, theoretically it might be possible, but practically it might work out very badly as preventing the commonwealth entirely from getting rid of supplies which it had bought and on which the market had sunk so that it could not sell them "at cost."

Judge SHELDON: With reference to what has been said I should like to ask whether there might not be, after all, a somewhat more serious question in this amendment if we apply to the words used in the amendment the familiar principle that in all cases of doubt the meaning to be put upon any particular word is best to be found by considering the collocation of that word and the words with which it is joined, applying the familiar legal maxim, *noscitur a sociis* — whether the word "exigency" here used in the alternative can, after all, be considered as mere convenience, the release of people from a privation which is of ordinary existence. The words are "during time of war, public exigency, emergency, or distress." War may be rejected at once; nothing, of course, under that would be applicable in times of peace. Coming then to the "public exigency, emergency, or distress," is it certain that those three words being used together could be construed to mean matter of mere convenience? Is it certain, for example, that, say at some time in the future when we are at profound peace, when the present cost of living has shrunk somewhat to the dimensions that it filled ten or twenty years ago, when there is general prosperity in the community, although it still remains true that many people who depend for their livelihood upon mere

unskilled labor are unable from unskilled labor to defray the necessary expenses of bringing up a family — can we say to a certainty that if under those circumstances the legislature should pass a bill reciting that there was a public exigency to provide for such cases and accordingly authorizing the different cities and towns of the commonwealth to supply themselves with such necessities of life and to distribute at reasonable rates the same to their inhabitants, such a bill would necessarily be safe from interference by the Courts? Does not the general principle apply somewhat, that while every statute is to be construed as favorably for its constitutionality as it can be, while no statute is to be declared unconstitutional if there is any point of view in which the declaration of the legislature that it is for a proper purpose can be sustained, yet if there is no such point of view, if there is no possibility of saying that there was any unusual occasion — perhaps I might seem to be begging the question by that, but my question is whether these words are applicable when it could not be possibly said that there was any unusual occasion — can we say with any degree of certainty that such a statute might not be held to be unconstitutional? Is there not, after all, something here to be debated? I do not wish myself to express an opinion upon that. I have not considered the matter with that care which would warrant me in expressing an opinion, but is there not something fairly open to debate in that question?

MR. GRINNELL: Without undertaking to debate that question at present I call attention to the war aspect of this measure by referring again as I have already done, I think, to Section 6 of the Defense Act which was passed last May, which gives the Governor detailed and far broader power than this amendment mentions in any way, directly or indirectly. Under that section in that act the Governor has the right not only to take — according to the terms of it, at least — to take and to give away, to take and use everything that the Germans could take and use if we do not stop them. That has not been exercised as yet; whether it will be, I do not know.

In connection with that war aspect of the question Judge Hughes delivered an address before the American Bar Association which is reprinted in the belated August number of the Quarterly, and he discusses the constitutionality of the war powers of the President of the United States under the Constitution, and there may be something in that of interest to men who wish to study this question. We are temporarily, in the name of democracy, living under a dictator by an implied "gentleman's agreement."

Mr. STOREY: The Supreme Court of the United States has decided that the Constitution at war is the same as the Constitution in peace in the case of *ex parte* Milligan. There is pretty serious question in the minds of a great many people in this country whether in our effort to establish democracy abroad we are not in danger of losing democracy at home. The extraordinary power which was given to the Governor last year is a much broader power than is conferred here, and is, I think, a power the existence of which might very well be questioned under our Constitution. In other words, I do not feel that a man can be deprived of his property by the fiat of the Governor without the ordinary process of law which is secured to every citizen, but that all those questions — and they arise under the national legislation as well as under the state legislation — are questions about which the judgment of the country is in suspense. There are many of us who believe that when these laws are put in force it will be found that they were passed in a moment of hysteria, and that they were not wise. For example, we have the familiar illustration of the milkmen. If the price of milk is fixed at a certain price the result is simply that the producers of milk cease to produce it. They can sell their cows for a high price as beef, they cannot afford to keep them at the high price of corn, they are indifferent to the demand of the community for milk, and consequently the milk supply falls off. In the same way we are told that the farmers of the West are likely to plant something like twenty-five per cent less wheat than they did last year. The demand is just as great, but the price is limited or likely to be limited, and consequently they say, "What is the use of spending time and labor to produce wheat if we can't send it to the market?" There is a general insistence that the farmers should go to work and produce things at a limited price. I think the laws of supply and demand in the long run are more reliable.

Take the city of Boston, for example. It is supplied every day with the food that it needs, not by any legislation, but by the mere fact that here is a market, and that there are people who undertake to supply that market.

We have got to find out how this extraordinary delegation of the entire responsibility is going to work. My private impression is that it will be found before we get through to work very badly. I may be wrong, and I hope I am, but I have the doubts of what Mr. Luce called "the most conservative body of men in the community."

Now that I am on my feet I should like to say to Mr. Luce,

whom I am glad to see sitting here, that there is something to be said on the other side of that question of conservatism. In the first place, I doubt very much whether the lawyers can be called as a body the most conservative body in the community. I should like to remind him that in great crises in human history it is the small lawyer, the country lawyer, that has come to the front. Let me suggest to him Robespierre in the French Revolution, Abraham Lincoln during our Civil War, Lloyd George to-day at the head of England, and Kerensky in Russia, and I might multiply the illustrations. But those are the facts; the men who led the American Revolution were lawyers, young lawyers, small lawyers, if you please.

Now, Mr. Luce asked us last night what we had done to prevent the spread of a loathsome disease, which he felt was threatening our young men, what we had done in regard to air guns, what we had done in regard to preparation for war. I do not believe that upon the men whom he was addressing there rested any particular responsibility in regard to those things. I think that responsibility belongs to the community, and I would suggest that those are not matters for constitutional regulation.

MR. LUCE: So much that Mr. Storey has said is in accord with my views that I hesitate to take exception to one or two things. I hoped last night and it was my intention last night not to mention any line of activity which did not involve a constitutional question. I was told inside of two weeks by the leading authority, probably in the state, on diseases of the kind referred to, that in New York it had been found impossible to segregate and restrain syphilitics on the ground that it was an invasion of personal liberty, a distinct constitutional question. I think if time permitted I could show that everything that I referred to last night had been interfered with by constitutional restraints, and I wish we had time enough to discuss the particular constitutional difficulty involved in the matter assigned for the morning. The constitutional difficulty lies in the fact that about fifteen years ago the Supreme Court in an opinion to the legislature undertook to determine what sort of an exigency would warrant certain procedure. That struck me as the nub of this whole question before the Constitutional Convention: Is it a wise thing for the Court itself, for the judicial system of the commonwealth — is it a wise thing for it to have the burden of determining when an exigency exists? I may also say for Mr. Storey's information that it was my own service for a short time last spring as chairman of the Food Conservation Committee of the city in which I

dwel, that brought sharply to my attention the innumerable constitutional difficulties in the way of meeting the present situation. And if any gentleman here is a city solicitor he, I think, would bear me out in the statement that the city solicitors in Massachusetts in the last twelve months have in many cases stretched their consciences, in other cases felt it necessary to interfere with things that seemed to the rest of us absolutely important and desirable and necessary on account of these constitutional restraints. My argument last night was intended to bring out the belief that it was wise in the long run for the representatives of the people to determine when an exigency exists rather than to impose this burden on the Court, and that is the constitutional phase of this question which I shall be very glad if the gentlemen will further consider when opportunity permits.

Mr. ARTHUR E. BURR: Mr. President, may I say a word, because it is a matter of practical importance to me to determine the meaning of this amendment. I shall be in a position next year where I shall have to discuss it in the legislature. There will be no doubt that radical measures will be introduced. I think there probably will be no doubt that some such general measure will be put in, saying that the mayor and aldermen of a city or the selectmen of a town may provide food for its inhabitants, may buy it at reasonable rates, to be determined by a certain board, or may take it. The question will then be presented, is that a compliance with this constitutional amendment? In other words, to put it more concretely, what do the words, "as the General Court shall determine" modify? Do they modify only the manner in which the cities and towns may take and may provide the same? So far as the pure question of English is concerned, they do not modify anything else. But may it reasonably be determined from the purposes of the amendment that the General Court must in each case determine when a public exigency, emergency, or distress arises? Looking at that as I first read it, I should have said that that amendment meant that whenever war, public exigency, emergency, or distress existed, the municipality could provide in such manner as the General Court determined, and that it was not for the General Court to determine in any case whether there was a war, an exigency, or an emergency, but that still was a question of fact which the Court must determine. Now if that is not the meaning of it I shall be very glad to know it, because in that case I shall be glad to point with pride in any debate that I may enter into next year to the opinion of this conservative body that the amendment was only intended to give the legislature an oppor-

tunity to say when such an exigency was in existence. I do not think that is the natural meaning of it. If I am to argue any such question I should like to be well bolstered up by those who have more intelligence and more ability to read English than I have.

Mr. GRINNELL: Mr. Chairman, while the continuation of this discussion would be very interesting, I am afraid, as we are expected as guests of the Boston Bar Association at the City Club at 12.45, perhaps we ought to adjourn.

The PRESIDENT: Mr. Balch looks as if he wanted to say something.

Mr. BALCH: Mr. President, I do want to say something which I will say as quickly as I can. The legal profession, which should be the strongest defence of the commonwealth against this initiative and referendum measure, may prove a weak defender, or worse; and why? Because, sir, we lawyers as a class, it appears to me, although perhaps we have understood our own side of the case, seem to be committing the mistake of failing to grasp the other side of the case.

Nothing will help the reckless radical elements more than to have the bar discuss the measure with a cool assumption that their own view is the only view, that any one who disagrees with it in the least is a fool or a fanatic, that the constitution is a sacred text and they themselves its high priests. That attitude will not only hurt the chance that remains to us of preserving a moderately conservative form of government, but it will add fuel to the flames of the mounting prejudice against our profession. I fear that many of us would receive a severe shock if brought to a sudden realization of how we appear as a body—we members of the "Lawyers' Union," as our enemies delight to call us—in the eyes of a large and growing section of the electorate, and by no means a wholly bad, foolish, or despicable section either.

Now this initiative and referendum measure is full of the gravest flaws. It will not stand accurate analysis for a minute.

It is subject to fatal criticisms for which no answer exists. A pitiless, lucid showing up of its numerous weaknesses will kill it. The people will never pass it if they once really understand it. No one is so fitted to see that they *do* understand it as the lawyers of the commonwealth. But to perform that task we must first understand it ourselves. We shall never understand it ourselves unless we free ourselves from our traditional attitude as constitutional lawyers and do some real political thinking in terms of *to-day*. And finally, if we wrap ourselves in the cloak of our professional dignity, look backwards instead of forwards, inveigh

against the bill simply because it is a change, and indulge largely in expositions of the glories of the past — which are distinctly uninteresting and even a little irritating to a very large proportion of the men whose votes are going to decide this question and who have their attention sharply focussed on the economic conditions of the present and the future — then we shall have ensured the adoption of the amendment and therewith a great, lasting, and perfectly avoidable, injury to our commonwealth.

The meeting then adjourned.

NOTE ON THE POWERS OF THE CONSTITUTIONAL CONVENTION TO MAKE APPROPRIATIONS FROM THE PUBLIC FUNDS.

In the current newspaper reports of the discussions before the legislature as to further appropriations for the expenses and for additional compensation for members of the Constitutional Convention, some men appear to be taking the position that the convention has inherent power to vote appropriations directly, in such a manner that their payment can be enforced, but that they apply to the legislature to make appropriations because the legislature is the usual appropriating body. Other men take the view that if the Constitutional Convention has the powers suggested of acting directly there is no occasion for their asking the assistance of the legislature.

Without discussing the merits of the question of further appropriations, it seems to me that the law is clear and that there is no occasion for troubling the Supreme Court about it, as has been suggested.

I submit that the Constitutional Convention is solely an advisory body, with no direct legislative powers whatever to make appropriations, except so far as authorized by the act under which that body came into existence and that public funds cannot be raised and expended except through the existing constitutional machinery under the direction of the legislature, which is the only body to which the people have ever given general authority in such matters.

The original convention of 1779-80 does not appear to have been given specific authority to appropriate money in advance of its meeting, and accordingly it voted to apply to the legislature for an appropriation to cover expenses and compensation (see Journal of the Convention, pages 47 and 183). The act under which the convention of 1820 and of 1853 was called both contained the following provisions:

"That the said convention shall establish the pay or compensation of its officers and members and the expense of its session; and his Excellency the Governor, by and with the advice and consent of the council, is authorized to draw his warrant on the treasurer therefor."

The present Convention Act of Chapter 98 of 1916 contains —

"Section 7. The convention shall be provided by the sergeant-at-arms, at the expense of the commonwealth, with suitable quarters and facilities for exercising its functions. It shall establish the compensation of its officers and members, which shall not exceed seven hundred and fifty dollars for each member of the convention as such. It shall, subject to the approval of the governor and council, provide for such other expenses of its session as it shall deem expedient, and may cause to be prepared and issued a statement briefly setting forth such arguments as the convention may see fit relative to any revision, alteration, or amendment of the constitution adopted by it, or any part thereof. The members of the convention shall receive the mileage specified in section eight of chapter three of the Revised Laws, as amended by chapter six hundred and seventy-six of the acts of the year nineteen hundred and eleven. The governor, with the advice and consent of the council, is authorized to draw his warrant on the treasury for any of the foregoing expenses."

The facts giving rise to the discussion are that it was originally supposed that the Constitutional Convention would complete its work in the summer and fall of 1917. Early in the sittings of the convention the maximum of seven hundred and fifty dollars, specified in the act, was appropriated by the convention as the compensation for each of its members, and

(Continued on page 139.)

MEMORIAL OF THE AMERICAN BAR ASSOCIATION ON THE VOLUME OF AMERICAN JUDICIAL OPINIONS.

The American Bar Association, at its meeting in September, 1917, at Saratoga Springs, adopted the memorial hereinafter printed, together with the following resolution in regard to it:

Resolved, (1) That the appended memorial be presented to the court of last resort and appellate courts of state-wide jurisdiction in each state, to the United States Circuit Courts of Appeals and to the United States District Courts; that the presentation be made in open court in a formal manner by a member of this Association appointed by the incoming President, and it shall be his duty to procure, wherever feasible, the coöperation of an officially appointed representative of the state or local bar association; (2) that a printed copy of this memorial and of John W. Davis' address, delivered at the Chicago meeting in 1916, before the Judicial Section, be presented, or where that is not feasible, be mailed to each of the judges of said courts; (3) that the Committee on Reports and Digests be charged with the responsibility of such printing and mailing (see American Bar Assoc. Journal, January, 1918, p. 15).

Accordingly, the Secretary of the Massachusetts Bar Association, acting also as a member of the American Bar Association, was requested to present these documents to the judges of the courts in Massachusetts and in the First Circuit, referred to in the foregoing resolution, in accordance with the general plan. After consultation with the Publication Committee of this magazine it was decided that in this jurisdiction the best method of presentation was that of sending copies of the documents to each of the judges of these courts, and subsequently reprinting them herein in order to bring generally before the bench and bar a public and professional problem which bears not only on the future development of the law, but on the whole problem of legal education and the development of effective and useful legal minds. This plan has been carried out by the secretary.

In this connection it should, perhaps, be stated, in order that there may be no misunderstanding, that the average length of opinions of our Massachusetts Court and of the Federal Courts in

the First Circuit is, and has been, less than that of most of the courts in the country, and these courts deserve credit for this record. The question raised by these discussions is a question of general policy growing out of practical conditions, and it is believed that these courts can, and will, continue to lead in this respect among the courts in the country, as they have done in the past.

MEMORIAL

Presented by The American Bar Association

To the

United States Courts and the Appellate Courts of the Several States:

The American Bar Association, as representative of all branches of the legal profession in America, and with conscious pride in the manner in which American courts have discharged and are discharging their judicial duties, ventures, in a spirit not of criticism, but of coöperation, to address to the courts of the country whose opinions are reported in the books the following memorial:

For many years the accumulation of the reported cases which form our body of legal precedent has been the subject of grave concern. The acceleration in their numbers in recent years is such as to create alarm. More than 11,500 volumes of American reports are now extant, and those published within the last thirty years exceed in number the total for all the years preceding. In our system of state and federal governments we have far more courts of last resort than any other people have and, with the growth of population, litigation in all these courts must increase in like proportion. Unless, therefore, the problem is seriously attacked it is not improbable that in the near future the burden of accumulated precedent will become not only serious, but insupportable. Indeed, it may ultimately jeopardize our whole theory of customary, as distinguished from codified, law, and may impair, if not destroy, our doctrine of the sanctity of judicial precedent.

The American Bar Association recognizes the joint interest of the bench and bar in the premises, and does not minimize the share of the bar in the responsibility for the evil nor its duty to coöperate in applying the remedy. It believes, however, that the matter is one for the especial cognizance of the judiciary and that no effort at reform, whether it comes from the profession itself or from the legislative branch of the government, can be so effective as those remedies which judicial initiative alone can supply.

With a deep sense of the gravity of the situation the Association is impelled, therefore, to approach the courts of the country and to urge that they seriously address themselves to the problem presented. In so doing criticism is foreign to its intent and censorship beyond its power. Certain concrete steps may be referred to because they have been so often discussed that they may be treated as representing the common judgment of the profession. These are: (a) A conscious effort at the shortening of opinions and the recognition of brevity as a cardinal virtue second only to clearness; (b) an avoidance of multiplied citations and of elaborate discussions of well-settled legal principles and of lengthy extracts from text-books and earlier opinions; (c) the presentation of so much, and no more, of the facts as are necessary to present the precise question at issue; (d) a reduction of the number of reasoned opinions and a corresponding increase in the number of memorandum or *per curiam* decisions, with a brief statement, when necessary, of the points decided and of the ruling authorities.

To such efforts as may be made in pursuit of this and similar reforms, the Association, speaking for itself and its membership, pledges to the judiciary its hearty support.

THE CASE FOR THE CASE LAWYER.

BY

JOHN W. DAVIS,
Solicitor General of the United States.

BEFORE THE JUDICIAL SECTION OF THE AMERICAN BAR ASSOCIATION,
Chicago, Illinois, August 23-29, 1916.

Five centuries ago Fortescue described the life of a judge as one of contemplation rather than of action, removed from worldly strife and — most notable of all — free from every care. If, as we of the bar assume, this description still holds true, he is rash, indeed, who would disturb by his clamor the dwellers in this Elysium. Should he do so, he must keep in mind the limitations both of time and topic that attend him. To a gathering of mere lawyers one may talk — endlessly — of endless things. Indeed, one who follows the reports of the various bar associations of the country cannot fail to observe the wide range of subjects which claim their attention. He must be struck also with the genuine necessity for the adoption by them of some such motto as the lines:

"Cease to lament for that thou canst not help,
And study help for that which thou lament'st."

Lawyers are not alone in finding it easier to criticise than to construct; to discuss than to resolve; to diagnose than to cure. It is only as such associations subdivide themselves into groups and sections that any circumscription of topics makes itself felt or any definite plans and processes appear.

Such a section you purport to be. You do not exist merely to duplicate the program of the general body nor are you, in spite of your eminence, a second chamber or a House of Lords. A divorcement of that sort, let me assure you, would be as much regretted by your professional brethren as it would no doubt be displeasing to yourselves. In the democracy of the American Bar Association distinctions of rank and station as between lawyers disappear; only those differences based on diversities of functions and duties remain. But so long as these exist it is most expedient that those who are invested with the one or charged with the other shall prosecute in concert inquiries of their own concerning the performance of their peculiar tasks. In a word, I assume that this assemblage is devoted to what may be called the technique of the judicial art—the science of the administration of justice. And all this one who is honored by an invitation to address you must bear in mind.

You have heard from your own household in the person of your distinguished colleague, Mr. Justice Pitney. I come now to ask leave to speak to you for the bar, and, of course, in that character, "humbly complaining." If the complaint seems one of such long standing that it may be justly considered chronic, and if there is a certain vagueness in the prayer for relief, let it receive only such indulgence at your hands as may be strictly required by due process of law. That the suit may not fail for want of a plaintiff, or I appear as a lawyer without client, I choose to prefer it on behalf of one who has been for years a legal Ishmaelite—his hand against every man and every man's hand against him, and to whom none is so poor as to do reverence. I ask to present the Case for the Case Lawyer.

Not long since a judge, mature in service and of broad opportunity for observation, expressed in private conversation his fear, if not his conviction, that the last forty or fifty years had witnessed a steady decline in the general learning and reasoning power of the American Bar; that the specific disease seemed to be a too universal resort to multiplied precedents, a too little reliance upon fundamental principles. He pictured the modern lawyer as a legal beaver, cutting down every tree, branch or twig which he could discover, and piling them up without regard to order of

arrangement or architectural result, hoping only that he might by some happy chance make his dam watertight against the juridical flow. If such an expression stood alone, it might be dismissed as the chance prompting of a pessimistic moment. But in the solemn deliverance of a court of last resort we read but yesterday this:

"Case law is fast becoming the great bane of the Bench and Bar. Our old-time great thinkers and profound reasoners who conspicuously honored and distinguished our jurisprudence have been succeeded very largely by an industrious, painstaking, far-searching army of sleuths of the type of Sherlock Holmes, hunting some precedent in some case, confidently assured that if the search be long enough and far enough some apparently parallel case may be found to justify even the most absurd and ridiculous contention. Case after case is piled, Ossa on Pelion, and about an equal number can be found on each side; then the court is expected to strike the balance and decide according to the preponderance of cases rather than the preponderance of reason and justice." (Wanamaker, J., in *State v. Rose*, 106 N.E. Rep. 50, 52.)

These are grievous words and hardly to be borne. Even if deserved, may there not be interposed a plea in mitigation of the offense?

For, be it said in extenuation, if not defence, of the case lawyer that he is not wholly a self-made man; his weakness is not entirely of his own deliberate choosing. He is rather the product of an environment and of circumstances which he is powerless of his own motion to change or greatly modify. Let us reflect upon some of the forces which have worked his undoing. In a measure, he was foreordained to this estate by the common law itself. We boast of a jurisprudence founded upon judicial precedents, which grows from age to age as times and customs change, keeping step always with the new, but advancing along a path constantly illumined by the accumulated wisdom of the past. We exalt the flexibility and adaptability of such a system in contrast with the rigidity of the Roman codes, and we claim for it greater certainty in application than even the codes themselves when the latter are administered by courts in no way bound to-day by the decisions of yesterday. We do not impose upon our courts the rule of the House of Lords, which is supposed to be without power to depart from its own prior decisions; but we listen with incredulous wonder to the German doctrine — latterly somewhat shaken, it is true — that no precedents, whether of a higher or of the same tribunal, have any binding force. Nor are we persuaded to abandon our ancient moorings even by the

encomium of Professor Maitland, who declared the German codification of 1896 "the most carefully considered statement of a nation's laws that the world has ever seen," adding, "Never yet, I think, has so much first-rate brain power been put into an act of legislation." But it is one thing to exalt the merits of a legal system and another to ignore its disadvantages. To make precedents the fount and origin of the law is to compel their study; to compel their study is to put a premium upon the knowledge so acquired; and to put a premium upon this knowledge is to encourage its overexhibition by the overzealous. We should think of the case lawyer at least with the charity due to one who has been led into temptation.

Whether this doctrine of the binding force of judicial precedents could survive in an age of oral tradition may be doubted, but so far as we are concerned it has confronted no such test. No sooner was it firmly bedded in the English law than there came to nourish it that long line of reporters who — to use a figure certainly as old as Bracton himself — ministered at the altar of justice and fed its sacred flame: The men of the year books, described by Coke, perhaps not without reason, as "grave and sad," Plowden, and Coke, and Saunders, and Burrows, and Vesey; and so on down the roll to the modest anonymity who hides himself to-day under the pseudonym of 333d So-and-so — only to be re-christened in the not distant future by mere force of mathematics as 666th of the same. Nor had these worthies been at work before the accumulation of their labors began to be a subject of concern. Coke and Bacon, as we know, deplored the multiplication of cases, while at the same time across the Channel their great contemporary, Montaigne, was declaring:

"In sowing and retailing of questions, they make the world to fructify and increase in uncertainties and disputes, as the earth is made fertile by being crumbled and moved about deep. *Difficultatem facit doctrina*. We doubted upon Ulpian, and are now still more perplexed with Bartolus and Baldus. We should efface the trace of this innumerable diversity of opinions and not stuff ourselves with it, and stupefy posterity with it."

And again:

"We give the authority of law to infinite doctors and infinite decisions and as many interpretations; yet do we find any end to the need of interpreting?"

In 1786 Mr. Justice Buller (*Birch v. Wright*, 1 T.R. 378, 383) spoke of the "Herculean labour" of wading through the cases in

Comyns' Digest; and 100 years later the American Bar Association listened to a report signed by David Dudley Field, John F. Dillon, E. J. Phelps, and J. O. Broadhead — *nomina clarissima* — which declared:

"A single word expresses the present condition of the law — chaos. Every lawsuit is an adventure, more or less, into this chaos. . . . It is idle to think of going on as we are going. The confusion grows worse all the time. Chaos deepens and thickens daily."

Three decades have elapsed since that meeting, successive papers and reports have been read and filed, and at this present session we shall have a report on the same subject, not materially different in tenor. Statistics have been collected over and over again. Those of a recent census are worth repetition here.

There are now extant 6,836 volumes of British reports, including those of Canada and the colonies, as well as the United Kingdom. Of official and semi-official American reports, from courts, both state and federal, there are 9,621 volumes, to which, if there be added 1,015 volumes of the Reporter system and 914 volumes of selected cases, the total amounts to 11,650 volumes. During the year 1914 over 150,000 pages of American judicial decisions found their way into print, and the West Publishing Company during that year received for publication no less than 23,900 cases. But the fact of largest import is that of the total American volumes over 6,000, or more than one-half, came from the presses in the 30 years which have elapsed since Field's report in 1885.

All this pabulum is spread before the Bar. Some there are who are wise enough not to attempt the impossible, and who are content to pick and choose with nice discrimination. But is it any wonder that others, perhaps with minds less astute and industry more dogged, spend toilsome days and weary nights in the mere search for cases parallel to their own?

Does not the case for the case lawyer come to this: that so long as the law is based upon precedents, so long as judges multiply them, and so long as printing presses issue them, just so long will the case lawyer spend his time in their collection, and just so long will he belabor the courts with the fagots he has thus industriously bound? Mere remonstrance will not affect him. While the drug is furnished the habit must continue. Whether he be one of those unhappy men who lack the power to reason upon abstract themes, whose mind never felt the thrill of an independ-

ent effort; whether he has been denied by adverse fate the training others have enjoyed; or whether he be simply by nature perverse and to sin abandoned — whatever his class — you will more easily persuade a drunkard from his cups than you will him. For when from your judicial eminence you frown upon him in the midst of his debauch, he rolls from his inebriate tongue the stanza :

“ Why be this juice the growth of God, who dare
 Blaspheme the twisted tendril as a snare?
 A blessing, we should use it, should we not?
 And if a curse, why, then, who set it there? ”

Now, who shall minister to his disease? It must be confessed, to change the figure, that the prospect for voluntary disarmament is not flattering. The sins of the Bar are done, and the habits of the Bar are formed, by two and two; certainly in no other walk of life is it more profoundly true that no man liveth to himself. In those localities where general libraries are not accessible, the process goes after this fashion: Jones, who has been a man of small beginnings, broadens out into federal practice and buys the Supreme Court Reports. Smith, his rival, immediately does the same, adding the Federal Reporter. Jones retaliates with a series or two of selected cases; whereupon Smith mortgages his home and installs the whole Reporter system. At the end of the war both are on a paper basis. Jones cites 10 cases in his support; Smith counters with 20; and nothing but the limits of time and energy will debar Jones from evening up the score.

It has been the fashion to call upon legislative omnipotence to devise a cure for every ailment of the body politic. But for more than one reason that course seems not to be open here. The present state of affairs in this field is not encouraging. At least 15 of the state constitutions (Arizona, California, Indiana, Louisiana, Maryland, Michigan, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Virginia, Washington, and West Virginia) expressly require either that all opinions of their courts of last resort shall be in writing, or that the reasons for their judgment shall be stated, or that such opinions shall be in writing and shall set forth the grounds on which they rest. The states of North Dakota, South Carolina, and West Virginia, determined that no guilty point shall escape, enjoin that “ every point fairly arising upon the record of the case shall be considered and decided,” and the reasons therefor stated in writing. Some 20 others (Colorado, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire,

New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Wisconsin, and Wyoming) in effect make similar demands by statute; and Michigan, by constitutional provision, in order that light may be reflected from every facet, was careful to provide that the rule shall apply with equal force and effect to dissenting opinions. Vermont takes stern measures against any suppression of opinions by suspending the pay of those judges who do not, unless prevented by sickness or other unavoidable cause, deliver to the reporter of the court by the first day of October all opinions rendered by them during the year, certifying to the Auditor of the State that they have done so.

Many states, to their credit, he it said, direct the publication of those opinions only which the court may deem of sufficient importance to warrant it. Maine, with sublime confidence in the discretion of its official reporter, leaves this weighty decision and selection to him. But at least 15 of the states are unwilling that any fragment shall be lost, and expressly enjoin the printing of everything to which their courts give utterance. To this Nevada, with what seems an excess of zeal for the dissemination of legal truth, adds the requirement that all opinions of her court of last resort shall be printed in full in two successive issues of some daily paper published in her capital city.

But better than all other reasons for not referring the matter to legislative handling is the fact that you yourselves (I speak in a collective and impersonal sense) forbid it. Mr. Justice Field, when on the Supreme Bench of California, disposed of the question by declaring in ringing language that any attempt by legislation to control the mode and manner in which the courts should perform the function of judicial deliverance was a palpable encroachment, and as such not to be borne. Said he:

"If the power of the legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing and enforce their oral announcement, or prescribe the paper upon which they shall be written and the ink which shall be used. And yet no sane man will justify any such absurd pretension; but where is the limit to this power if its exercise in any particular be admitted?

"The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions." (Houston v. Williams (1859), 13 Cal. 24, 25.)

One after another you have echoed these sentiments.* Indeed, commands of this character have been somewhat cavalierly treated even when they came to you clad in all the solemnity of a constitutional mandate. Thus the Supreme Court of the State of Indiana disposed of an embarrassing constitutional injunction through the medium of construction, saying:

"It is true that the constitution, by an unwise provision, requires that this court shall give a written opinion upon every point arising in the record of every case—a provision which, if literally followed, tends to fill our Reports with repetitions of decisions upon settled as well as frivolous points, and often to introduce into them, in the great press of business, premature and not well considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the legislature to use good *English*. But though the provision is not to be disregarded, it is to be observed according to some construction, and should receive such a one as to obviate its inconvenience and objectionable character, as far as consistently can be done. . . .

"These, and other considerations, have led the court to inquire: When does a question, in the sense of the constitution, arise in the record?

"We do not think it does so merely because it is raised by counsel, nor because it is presented in the assignment of errors. Nor, necessarily, because it is raised in a bill of exceptions. It must be a question, the decision of which is necessary to the final determination of the cause; and which the records present with a fullness and distinctness rendering it possible for the court to comprehend it in all its bearings." (*Willets v. Ridgway*, 9 Ind. 367, 369, 370.)

With even less show of effort the Supreme Court of Appeals of West Virginia has professed its respect for such a constitutional provision, but its firm determination not to be hampered by it.

Sometimes, for the benefit of the Bar, your views have been stated with emphasis, as, for instance, this from the Court of Appeals of Kentucky:

"The counsel for the appellee needlessly complains in the pleadings that this court, in affirming the judgment, delivered no opinion. He cites the statute, which says: 'The court must deliver written opinions in all cases.' We by no means claim never to err in opinion. It might be well for the experienced counsel, *even as to himself*, to recollect that it has been said

* *Baker v. Kerr*, 14 Iowa, 384; *Vaughn v. Harp*, 49 Ark. 160; *Adams v. R.R. Co.*, 77 Miss. 194; *State v. District Court*, 40 Mont. 206; *McQuillan v. Donabue*, 49 Cal. 157; *Henry v. Davis*, 13 W. Va. 230; *Hall v. Bank*, 15 W. Va. 323; *State v. Williams*, 49 W. Va. 220; *Willets v. Ridgway*, 9 Ind. 367.

aliquando bonus dormitat Homerus. We do not see, however, how the court could deliver a written opinion when its members are equally divided in their views." (Louisville & Nashville R. R. Co. v. Sharp, 91 Ky. 411, 414.)

There can be no doubt that all this is in sympathy with the spirit of the times. There is a healthy and growing disposition to leave problems dealing with the practical administration of justice to those by whom justice is to be administered. The doctrine of the recall of judicial decisions has ended its ephemeral life and passed into the limbo of the things that were. The admission or exclusion of evidence is being more and more recognized as a matter not to be regulated by statutory rule of thumb. And we seem on the verge of indefinite resolve to control our pleading and practice by elastic and intelligent rules of court, rather than by slavish adherence to antique forms or by the interminable and rigid intricacies of legislative codes.

I feel, therefore, that the jurisdiction of this body to entertain the subject I am suggesting will not be challenged. You may, however, ask that a bill of particulars be furnished, and so, with no pretence to originality, I ask leave to repeat some of the things which the Bar has been and is saying about your labors.

It has been asserted that there are too many opinions; that it would be well to write none at all upon affirmance when upon mere questions of fact, of practice and procedure, or upon principles previously decided; that, indeed, they might be dispensed with upon affirmances of every sort, unless there be some question of importance involving the public interest, the construction of a constitution or a statute, the enunciation of a new principle, or the modification of an old one; and that even upon reversals there are many opinions written which add nothing to the state of the law, however much they may contribute to the peace of mind of the litigants.

Shorter opinions have been frequently hinted at. Is it not clear that long and discursive opinions not only burden the profession but confuse the law? Only genius can write at great length without blurring the outlines of the principles discussed. Why, to touch but lightly upon particulars, should pages be spent in the statement and argument of facts, in proving the rule announced to be the law of the jurisdiction or in labored refutation of opposing arguments which have been summarily rejected?

There is a substantial and — as I believe — an increasing sentiment in favor of selective reporting. Many states now provide for the publication of only those opinions deemed by the court of

sufficient importance to warrant their preservation in this manner. No tender consideration for the vanity of counsel or of litigants should burden the exercise of this wholesome power. And if private enterprise shall in the future, as in the past, seize upon the situation as an excuse for the publication of unauthorized collections of unreported cases, it lies quite within the power of the courts to discourage their use in briefing or in argument. Cases are selected and cited with the hope that they may persuade the court—they will not be cited long when their presence is ignored.

This leads quite naturally to the repeated criticism that entirely too many cases are cited by all of us. Not long since, I am told, a brief was filed in the Supreme Court of the United States, in the closing hours of a busy term, supporting a petition for a *certiorari*, which cited by name no less than 432 cases; and one naturally wonders whether it was the client or the court which was intended to be impressed thereby. But, on the other hand, in a court of very high authority which shall in this presence be nameless, and in a case which it is unnecessary to designate, an opinion of 65 pages contained 351 citations, and another from the same pen in 50 pages of opinion cited 325. Could you blame our supposititious case-inebriate if, under such conditions, he should turn upon you with the remark, "Physician, heal thyself"? The truth is, gentlemen, that while we of the Bar cite far too many cases, we will continue to do so just so long as there appears to be safety with you in numbers. The paramount ambition of the Bar is to supply you with the mental food for which you evince an appetite. If it seems to you a duty to assemble in your opinions a vast array of earlier cases of like tenor, the Bar will strain every nerve to anticipate your labors. But neither briefs nor opinions are designed to usurp the functions of a digest, and we shall cease to burden them and ourselves with a multitude of precedents just as soon as we jointly resolve to throw off the burden.

Perhaps under our system of coördinate sovereignties and co-equal courts of last resort a diversity of opinion is inevitable. Nevertheless, its prevalence among courts administering the same fundamental principles cannot be otherwise than a regret to the profession, and more or less of a scandal to the laity. No one would ask to exalt uniformity of decision to a fetish—certainly not at any sacrifice of conscience or conviction—but can we be too often reminded, as has been done by Professor Pound and others, that it is, after all, a "common law" under which we live, and that a common law presupposes and imports a common

interpretation? Is there not need for a conscious striving to keep the road beaten by the many rather than to indulge in the discovery of new pathways, no matter how alluring? Are progress and originality necessarily synonyms? In this, as in many other walks of life, I am persuaded, moreover, that many differences, after all, are more matters of words than of substance. It is no small temptation to turn a new phrase of one's own making to express an old thought rather than to adopt some well-worn formula. But words, to use a Scotch adjective, are "pawky" things—nowhere more so than when they are used to describe and delimit human rights and remedies; and we shall do well when a legal idea has once crystallized into language to accept the established phrase as current coin.

Recalling the limits of time set by your invitation, I am warned that my topic has been pursued far enough. My purpose has been merely to call it to your attention. If, remembering that I speak upon an August afternoon, I have dealt with it somewhat lightly, may not its gravity be estimated in inverse ratio to the casual manner of its presentation?

As we look at the common law with its vast body of precedents, ancient and modern, it seems to lie about us like the waters which encompass the globe. From the vast reservoir of the seven seas they are withdrawn to the hills, and by many rivulets and streams they pass in blessing through the land only to return once more to the ocean and thence renew their endless round. So with the principles and precedents of the law—caught up by reason and industry they are gathered by the joint labors of the Bench and Bar and poured into that mighty flood of current decisions which rolls past the haunts of men until it, too, is merged in the record of the past. But, like the water, it goes only to return. Later decisions will cite those rendered to-day, as they in their turn quoted their predecessors, and as the seasons roll, will gradually sink to those profounder depths of time whose stillness is but rarely disturbed. The problem of the hour is to keep this stream within its banks; to so regulate its flow that it shall be a blessing and not a burden; that instead of doubt and confusion, it shall give life and ordered liberty to the sons of men.

In a large and peculiar sense the laws and institutions of your country are in your keeping. To the inherited doctrine of judicial precedent we in America have added the power of the courts to pass upon the validity of legislation, and have thus exalted them to a station never before attained. We have made of the judiciary an independent and coördinate branch of the govern-

ment competent to protect and defend its own independence. We have vested it with authority not merely to settle the disputes of litigants, but in a very real and vital sense to frame the law itself. And to its rulings we have yielded at all times ready and unquestioning respect and obedience. Because of these very things the problem I am suggesting is yours and not another's. The remedy for these complaints, if there be one, must be of your own devising. The leadership is yours, both of necessity and of right. Yours is it to decide whether the case lawyer shall continue to darken your counsel by words without wisdom; yours to decree whether the rising tide of case law shall be checked or stayed; and above all, yours the fateful decision whether we shall stand by the ancient landmarks or whether our whole doctrine of customary law shall confess defeat and give way to a code — and not to a code in a national sense, but to at least 48 codes, each subject to the constant whim and caprice of as many legislative bodies. I respectfully submit that no more important question can engage the attention of this body, and none in which, by creating a community of sentiment and of action among your fellows, more can be done for the good of the profession and the country.

Nor need you fear that your efforts will go without appreciation. Once this task is entered upon in earnest, there will come to you from the Bar that benediction with which delighted counsel greeted a favorable judgment by the worthy John de Walsingham, "Blessed be the womb that bare thee."

NOTE ON THE ADMISSION OF ALIENS TO THE BAR.

It is doubtful whether the bar or the public generally realize that it is not necessary to be a citizen of the United States to become a member of the Massachusetts Bar, although it is necessary that every man who is admitted as an attorney "shall in open court take and subscribe the oaths to support the Constitution of the United States and of this commonwealth."

§§ 41 and 43 of Chapter 165 of the Revised Laws as amended by §§ 2 and 3, Chapter 355 of 1904, provide:

"A citizen of the United States or an alien who has made the primary declaration of intention to become a citizen of the United States, whether man or woman, may, if of the age of 21 years, file a petition to be examined for admission as an attorney-at-law and if found qualified to be admitted as such."

If, upon examination, the Board of Bar Examiners "reports that the petitioner is of good moral character and of sufficient acquirements and qualifications and recommends his admission, he shall be admitted, *unless the court otherwise determines*, and thereafter may practise in all the courts of the commonwealth."

The provision allowing admission of aliens who have taken out their first naturalization papers was first enacted in 1852 by Chapter 154 of that year.

The question naturally arises, under the present circumstances, whether it is advisable that any more aliens should be admitted to the Massachusetts bar, and given the right to

(Continued on page 122.)

CONVEYANCE OF A FREEHOLD ESTATE TO COMMENCE IN THE FUTURE.

(With Forms for Use in Practice.)

The decision of the case of *Trafton v. Hawes*, 102 Mass. 533, attracted considerable attention at the time, for it went against a commonly received opinion in declaring that a conveyance of an estate in fee simple intended to commence in the future might be supported as a covenant to stand seised to the future use of the grantee, although the only consideration was a pecuniary one. Similar conveyances in some previous cases had been supported as covenants to stand seised on the ground that a consideration of blood or marriage might be presumed from the relationship between the parties, notwithstanding only a pecuniary consideration was expressed in the deed. But in this case no such relation existed, and the only consideration was a sum of money and the performance of future services.

By the deed of conveyance it was expressed that the grantor, in consideration of \$650 paid by the grantee, did thereby "give, grant, bargain, sell, and convey unto the said Elizabeth Cook, her heirs and assigns forever," two pieces of land, "To have and to hold the aforegranted premises to the said Elizabeth Cook, her heirs and assigns forever, *after my decease*, upon condition that she continues to keep my house and take care of me during my natural life, or her own natural life if she dies first; the wood on the last lot not to be cut by him or her during his life, *to her and their sole use and behoof forever.*"

It was laid down in the judgment that it had always been held that a feoffment, or other conveyance deriving its operation from the common law, cannot be made to take effect in the future. It was also said that the same rule was applied in England to a bargain and sale, which derives its operation from the statute of uses, and cases in this state were mentioned in which this had been recognized and declared; and in some of these cases the court might be said to have impliedly recognized the doctrine that a covenant to stand seised required a consideration of blood or marriage, but it had never actually declared such a consideration to be necessary, though unquestionably it was necessary in England. As relationship by blood or marriage did not exist in this case, it became necessary to examine the source of the distinction between covenants to stand seised and other contracts and conveyances.

Before the statute of uses (27 Hen. 8, c. 10), a deed of bargain and sale, or a covenant to stand seised did not convey the title to the land itself, and was regarded only as a contract giving a right to the beneficial use, which was enforced in equity. "A bargain and sale," it was said, "implies the sale and transfer of an interest existing at the time in the bargainor, whether in possession, or in remainder or expectancy. A covenant to stand seised implies the creation of a new interest in the bargainee out of the estate of the bargainor." Whether a deed belonged to one class or the other was determined by the subject matter and the apparent intent of the parties rather than by the form of the instrument. But the courts of equity refused to interfere in favor of a mere volunteer, and so it was necessary in all cases to show a consideration. A bargain and sale necessarily involved the idea of a valuable consideration. A covenant to stand seised did not exclude the idea of such a consideration, and the courts also held that a consideration of blood or marriage was sufficiently meritorious to sustain the deed. Shortly after the passage of the statute of uses, and in the same session of parliament, another statute was passed providing that no estate of inheritance or freehold should pass, or use thereof be made, by reason only of any bargain and sale, except by writing indented, sealed, and enrolled as specified, within six months after the date (27 Hen. 8, c. 16). This statute did not apply to covenants to stand seised in consideration of blood or marriage, and they continued to be good without enrolment. Hence, it became the law of England that a covenant to stand seised upon a valuable consideration, without the relation of blood or marriage, was ineffectual [without enrolment]. The statute of enrolments had no application to this country, and the reason for distinguishing between a deed of bargain and sale and a covenant to stand seised on the ground of the nature of the consideration did not exist here. The deed might therefore be sustained as a covenant to stand seised, notwithstanding the absence of the relation of blood or marriage.

It would seem that the same result might have been reached by a simpler and more direct course and in a manner more consistent with the words of the deed. The first part of the deed contains a present grant of the land to Elizabeth Cook and her heirs and assigns, which operated in the same manner as a feoffment at common law, without any words postponing its immediate effect. This is followed by an *habendum*, by which she was to have and to hold the granted premises to her and her heirs and assigns *after* the grantor's decease (subject to the condition of taking care of

him and his house meanwhile) to her and their use forever.* The use is limited to her only after his decease and would then take effect (Wms. R. P. (13th ed.) 292; (22nd ed.) 383). In the meantime the use resulted to the grantor, according to the general rule, that, whenever only a part of the use is expressly limited, the part that is undisposed of results to the grantor (2 Bl. Com. 334, 335; 1 Preston Estates, 183; 1 Sanders Uses, 101, 102). The limitation of the use to her after his decease clearly shows his intention not to part with the use during his life (1 Sanders Uses, 102). The effect was accordingly the same as if the words "to my own use during my life, and" had been inserted immediately before the words "after the grantor's decease." That would have been a plain way of conveying a future freehold estate and retaining the land in the meantime (Wms. Settlement, 22; 1 Hughes Conv. 665, 670), and, if the conveyance had been so expressed, no question would have arisen as to its validity or effect. The rule that a freehold estate cannot be created to commence in the future applies only to conveyances deriving their effect from the common law (2 Bl. Com. 165-166, 334), and after the statute of uses there was no difficulty in creating such a future estate (Wms. R. P. (13th ed.) 292-3; (22nd ed.) 383-4). A man "can convey the land immediately to an use which is to give an estate of freehold to commence in futuro" (2 Preston Conv. 475-6). In marriage settlements it was a common practice from early times to limit the first freehold estate to the intended husband or wife by way of use commencing from the marriage, reserving the use meanwhile to the settlor (Wms. R. P. (13th ed.) 293; (22nd ed.) 384; 2 Key & Elph. Conv. (3rd ed.) 679-680; (9th ed.) 754; 2 Bridgm. Conv. 270, 276).

This point seems not to have been brought to the attention of the court, and the report does not even show that the deed contained the words declaring the use, but they appear in the copy of the deed set out in the bill of exceptions. It is the more strange that the point was not raised, because in *Welsh v. Foster*, 12 Mass. 93, 95, which was quoted on the subject of bargain and sale, the point was raised and discussed. It was contended in that case that the deed might operate as a feoffment to the grantee to the use of the grantor until the happening of the contingency, and then to the use of the grantee and his heirs. But, as the court pointed out, the words granting the land were immediately followed by a proviso "that this deed shall not take effect or be

* As to the form of the declaration of the use, cf. *Gilbert Uses* (3rd ed.), 478, 436; *Simonds v. Simonds*, 199 Mass. p. 553.

made any use of until" the contingent event, and this prevented the deed from conveying anything that could be limited to any use in the meantime. In *Trafton v. Hawes*, however, there were no words postponing the effect of the present grant, which was only qualified by the declaration of the use in the *habendum*, and in these circumstances the argument would have been directly applicable.

In *Gale v. Coburn*, 18 Pick. 397, and *Brewer v. Hardy*, 22 Pick. 376, the words seem to declare such uses expressly, though in an unusual part of the deed.* In each of them the deed contained, after the words granting the land to the grantee in fee simple, a reservation of the use to the grantor during his life, followed by an *habendum* to the grantee and his or her heirs to their use forever. In the former of those cases, counsel attempted to sustain the conveyance on the ground that the deed "created a present estate in fee, and the interest reserved to the grantor was a distinct interest carved out of the estate granted," but no suggestion was made that the interest reserved was a use limited upon the estate granted, instead of an estate carved out of it. The court, having its attention thus diverted from the point, held that the deed could not have the effect contended for and must be construed to create a freehold estate commencing in *futuro*, but the deed was supported as a covenant to stand seised for a presumed consideration of consanguinity. In the latter case, the court mentioned the reservation of the use and said, "The use was declared for the covenantor and his wife, and afterwards to Susan. Here was a freehold estate capable of supporting the remainder, which by operation of law then vested." The deed was also upheld as a covenant to stand seised, as in the previous case. In the subsequent case of *Chenery v. Stevens*, 97 Mass. 77, where land was conveyed to seven grantees, a similar clause inserted in the same part of the deed was held to operate as a

*In *Gale v. Coburn*, 18 Pick. 397, by the deed (Midd. N.D., bk. 8, p. 608), James Var-num, in consideration of \$3,000 did give, grant, sell, and convey unto Samuel A. Coburn, his heirs and assigns the piece of land and buildings, "saving and reserving to myself, however, the right to use, occupy, and enjoy during my natural life, free of all rent, . . . the said land and buildings," *habendum* "to the said Coburn, his heirs and assigns to his and their use and behoof forever." In *Brewer v. Hardy*, 22 Pick. 376, by the deed (Hampden, bk. 81, p. 182), Charles Brewer, in consideration of \$1,500 did give, grant, bargain, sell, alien, release, convey and confirm unto Susan Brewer her heirs and assigns the parcel of land, "reserving the use and improvement of said premises to me the said Charles for and during the term of the natural life and lives of the said Charles and Anna Brewer, wife of said Charles and each of them as fully and completely as though this deed had not been made," *habendum* to "the said Susan, her heirs and assigns, to her and their own proper use, benefit and behoof for evermore." The deed in *Welsh v. Foster*, 12 Mass. 93, John Peck to Jonas Welch, is recorded, Suff., lib. 198, fol. 117.

limitation of the use to one of them exclusively for her life, subject to which the land went to the seven in fee in equal shares.* Bigelow, C.J., said (p. 85):

"Taking the whole deed together, we think it may be construed to be a present grant to all the grantees, taking effect immediately in them all. . . . But this grant is qualified by the clause which provides that said Almira is to have exclusive control of the premises and the income thereof 'for her own support and use during her natural life.' So far as Almira is the grantee of one-seventh, we do not see that her absolute title in fee is at all affected by these words; . . . but they cannot have effect consistently with an absolute grant in fee of the other six-sevenths to her children. Applying the well-settled rule of interpretation, that effect is to be given to every part of a deed so as to carry into effect the intent of the parties, if it can be done consistently with the rules of law, we think the grant to the children of the six-sevenths, in connection with the clause providing for the enjoyment of the estate by the mother during her life, may well be held to be a conveyance of so much of the estate to the use of the mother during her life and remainder to said grantees on the expiration of her life estate. To this extent the grant has all the essential qualities of a conveyance to uses. There are persons seised to the use of another, to wit, the six children named as grantees; there is a *cestui que use*, to wit, the said Almira; and a *use in esse*, to wit, the life estate which is executed immediately to said Almira. Cruise Dig. tit. 11, c. 3, s. 5; Crabb Real Prop. s. 1646. No precise form of words is necessary to create a conveyance to uses."

This explanation of the language relating to the use applies equally to the conveyances in *Gale v. Coburn*, 18 Pick. 397, and *Brewer v. Hardy*, 22 Pick. 376. As to the words that will raise a use, see also 1 Sanders on Uses, 95-96, and the notes.

The conveyances in the two last mentioned cases and in *Trafton v. Humes* were sustained on grounds independent of the uses declared in them, as was also that in *Wallis v. Wallis*, 4 Mass.

*The deed was expressed to convey to Almira Richards and her six children, by name, their heirs and assigns, "the tracts of land" in question, "but the said Almira . . . shall have the exclusive control of the said tracts . . . and the income thereof, for her own support and separate use during her natural life," *habendum* to the said Almira and her six children, naming them, "their heirs and assigns, to their use and behoof forever."

135, in which no use was declared.* Each of the deeds was treated as conveying no estate until the death of the grantor, and accordingly, as it could not operate as a conveyance at common law, the question was whether effect could be given to it as a covenant to stand seised to the use of the grantee, or as a deed of bargain and sale to him. It is difficult to understand how the idea originated in this state that a freehold estate to commence in the future could not be conveyed by a deed of bargain and sale. Bacon says, "if I bargain and sell my land after seven years, the inheritance of the use only passeth; and there remains an estate for years by a kind of subtraction of the inheritance or occupation of my estate, but merely at the common law" (Bac. Uses (Rowe's ed.), 65; 7 Bac. Wks. (Sped. ed.) 440). In *Davis v. Speed*, 12 Mod. 38, Holt, C.J., says, "if I bargain and sell to the use of another five years hence, this is a good future use." In Sheppard's Touchstone, by Preston, 511, a case is stated of a covenant to stand seised upon a future valuable consideration, and it is said, "This instrument takes effect as a bargain and sale, and the case proves that it is not necessary that the estate should pass immediately on the execution of the deed; also, that an instrument in the form and words of a covenant, may be a bargain and sale." Sugden, in Gilbert on Uses, 163, note, says, as to "a covenant to stand seised, or bargain and sale, the estate remains in the covenantor or bargainor until the springing use arise, and as these conveyances have only an equitable effect until the statute and use meet, a springing use may be limited by them at once. Therefore a bargain and sale to the use of J. D. after the death of J. S. without issue, if he die without issue within twenty years, would be good." Sanders says, "Thus, if a man covenant to stand seised to the use of the heirs of his own body, or to the use of another after his own death, or if he bargain and sell his lands after seven years; in each of these cases the grant is good, and until the event takes place, the use results" (1 Sanders Uses, 142). In 2 Preston on Conveyancing, 157, it is said, "A bargain and sale, or covenant to stand seised to uses, will be free from objection, although it is to give an estate of freehold to commence at a future day, or upon an event; as a bargain and sale to A and his heirs, To have and to hold to A and his heirs from and after Michaelmas day now next ensuing. So, in a conveyance to uses,

* By the deed in *Wallis v. Wallis*, 4 Mass. 135, Jonathan Wallis, in consideration of \$400, did give, grant, sell and convey to "Jonathan Wallis junr. his heirs and assigns to hold after my decease one quarter" of two house lots in Townsend, &c., *habendum* "to him the said Jonathan Wallis junr his heirs and assigns forever after my decease and not till then" (Midd. S.D., bk. 164, p. 70).

a use may be limited to A and his heirs from and after a given day or a particular event. In all these instances A has a future use, to be executed into estate, from and after the appointed period or designated event. In the meantime, the use will result to the bargainor, covenantor, or grantor, and the cestui que use will have merely an inchoate interest, and not an estate.* There seems to be no ground for saying that there was any rule in England that a bargain and sale could not be made to take effect in the future.

As an owner in possession could not at common law convey a freehold estate otherwise than by a feoffment, the only effect of a bargain and sale or a covenant to stand seised was that of a contract that the purchaser or covenantee should have the land. The Court of Chancery enforced this contract by obliging the owner to hold the land to his use (Burton's Compendium (7th ed.), 30, 39). The effect of these two kinds of contract was thus the same and gave the same right to the use of the land. Ordinarily the Court of Chancery did not specifically enforce voluntary agreements, although entered into under seal and binding at law (Pollock Contract (8th ed.), 205) but relationship by blood or marriage was considered a sufficient ground for enforcing a covenant to hold land to the use of persons so related to the covenantor (Gilbert Uses, 92). When such a relationship was the only motive for the contract, it could not be properly called a bargain and sale. But when the consideration was a pecuniary one, there was no reason why the contract should not be called a covenant to stand seised † or a bargain and sale according to the language in which it was expressed. There is no indication that a contract that land should belong to another from a future time was not considered a bargain and sale when it was founded on a pecuniary consideration, or that such a transaction was not as good and effectual as when the inducement was relationship by blood or marriage. After the 27 Hen. 8, c. 16, which required enrolment in the case of a bargain and sale, a covenant for a pecuniary consideration to stand seised to the use of another was not good unless it was enrolled, because it was in fact a bargain and sale and had the same effect as if the words "bargain and sell" had been used (Co. Litt. 271 b, Butler's note (1) VI., 1). After that statute the phrase "covenant to stand seised" naturally came to be used to distinguish covenants that were good without enrol-

* Sugden's is the most exact of these statements, for, in the case of a bargain and sale or covenant to stand seised, no use arises until the future event, and, as the estate does not pass in the meantime, there is no resulting use, but, in the case of a feoffment, or other conveyance passing the estate at common law, the use results until the future use takes effect (Burton's Compendium, 43, 47; Bac. Uses (Rowe's ed.), 231, note, 137).

† See *Benicombe and Parker's Case*, 1 Leonard, 25, at the end of the judgment.

ment from covenants that were made for a pecuniary consideration, and were therefore contracts of bargain and sale. But in a state where the statute is not in force, no reason exists for such a distinction.

In this state the earliest suggestion that a freehold estate to commence in the future could not be conveyed by a bargain and sale is found in *Wallis v. Wallis*, 4 Mass. 135 (1808). In this case, which was submitted to the court without argument, Parsons, C.J., said "that by a common law conveyance a freehold cannot be conveyed *in futuro*, yet by a covenant to stand seised to uses, such conveyance can be effected." Nothing is said about a bargain and sale, but, as the deed was expressed to grant and sell the land in consideration only of a sum of money, it seems to have been assumed that a bargain and sale was not admissible. This case was referred to in *Pray v. Pierce*, 7 Mass. 381 (1811), which did not involve any similar question, as one in which a bargain and sale from a parent to a child to take effect after the parent's death had been treated as a covenant to stand seised to the use of the child, "because, as a bargain and sale, it would have been a conveyance of a freehold *in futuro*, and therefore void." In *Welsh v. Foster*, 12 Mass. 93, 96, where a conveyance to take effect upon a future event was held to be invalid because the event was too remote, there was some discussion of the subject. Jackson, J., said that land might be conveyed "by a covenant to stand seised thereof to the use of another, either for certain good considerations, or for a valuable consideration; but in the latter case the conveyance, being in effect a bargain and sale, must have all the other requisites and qualities of a bargain and sale. One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use; from which it follows that a freehold to commence *in futuro* cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another, until the future freehold should vest." The former part of this statement, regarding a covenant to stand seised for a valuable consideration, seems entirely correct, but the conclusion is confused, and gives no intimation why the bargain and sale need be to the use of the bargainee before the use is intended to take effect. In *Parker v. Nichols*, 7 Pick. 111 (1828), *Gale v. Coburn*, 18 Pick. 397 (1836), and *Brewer v. Hardy*, 22 Pick. 376 (1839), there was a conveyance of an estate in fee simple from a future time for a pecuniary consideration, and the conveyance was upheld as a covenant to stand seised, a consideration of blood being presumed from the fact of con-

sanguinity, which was proved in the two last cases and appeared from the deed in the first.

The point appears not to have been raised in any of these cases that a future estate of freehold might be conveyed by a deed of bargain and sale. Counsel seemed content to accept the original dicta, unsupported by any authority, that such an estate could not be conveyed in that manner, and the court helped them out of their difficulty by presuming a consideration, other than the real consideration, which would support the deed as a covenant to stand seised. In *Trafton v. Hawes*, 102 Mass. 533, there was no relationship of blood or marriage between the parties to the deed, and the only consideration was a pecuniary one. No attempt was made to maintain the deed as a bargain and sale. The only claim was that it might be supported as a covenant to stand seised, notwithstanding the only consideration was a pecuniary one, and the court gave effect to this claim. The court repeated the former dicta in this state, that a bargain and sale, as well as a common law conveyance, was ineffectual to create a future interest in land,* but receded from the statement of Jackson, J., in *Welsh v. Foster*, 12 Mass. 93, 96, already quoted, that a covenant to stand seised for a valuable consideration was in effect a bargain and sale. It was said (p. 539), in the passage already quoted (*supra*, p. 112), that a bargain and sale implies the transfer of an interest existing at the time in the bargainor, while a covenant to stand seised implies the creation of a new interest out of his estate. But this negatives, not only the creation of a future interest by bargain and sale, which is sanctioned by the authorities above mentioned, but also the common case of a bargain and sale of an immediate estate for one year by the owner in fee simple, which by the operation of the statute of uses gave the purchaser such an estate without entry that he was capable of taking by a release the rest of the owner's estate (Wms. R. P. (13th ed.) 187, 188, 396; (22nd ed.) 204, 205, 517). It also leaves no room for a covenant to stand seised to the use of a son or daughter in fee simple, as to the validity of which no question seems ever to have been suggested (2 Bl. Com. 338; Shep. Touch. 507-8, 514).

As a deed of bargain and sale and a covenant to stand seised have the same effect by creating a use, which is executed by the

* This doctrine appears not to have been adopted in any other state (Gray, Perp., s. 57), and of the two cases cited in *Trafton v. Hawes*, 102 Mass. 536, as showing that it had been recognized in Maine, *Marden v. Chase*, 32 Me. 329, 332, contained only a faint dictum to that effect, and this was overruled in *Wyman v. Brown*, 50 Me. 139, 150-160, several years before *Trafton v. Hawes* was decided; and in *Emery v. Chase*, 5 Greenl. 232, the other case referred to, the subject is not mentioned.

statute of uses, and no enrolment or other formality is required in this state as to either of them that is not also required as to the other, there is no reason why a particular deed should not operate as one or the other according to the way in which it is expressed. In *Trafton v. Hawes*, 102 Mass. 533, the court held that a deed expressed as a bargain and sale was effectual to create and convey a future estate of freehold, but avoided overruling the previous dicta by saying that it took effect as a covenant to stand seised. There was, however, no other reason for saying that it did not take effect as a deed of bargain and sale, which is what it purported to be.*

J. L. THORNDIKE.

POSTSCRIPT.

The first of the following forms is for the conveyance of a freehold estate to commence in the future, and would be effectual, whether it was founded upon a valuable consideration, or a relationship by blood or marriage, or was entirely voluntary and without any such consideration or inducement. The two other forms show the manner of conveying an estate for life to one person with remainder to others, one of the forms operating under the statute of uses, the other at common law. The former is to be preferred, for there is less danger of mistakes in preparing it, and it can be more readily changed so as to adapt it to purposes that cannot be effected by a conveyance at common law. These forms would operate alike, either under the Act of 1912, c. 502, or independently of the provisions of that statute.

* See Gray, *Perp.*, ss. 56, 57. By the Act of 1697, c. 21, s. 1 (R. L., c. 127, s. 1), a deed was made effectual to convey land without any other act or ceremony. Since that statute a deed expressed as a bargain and sale of a present estate of freehold passes the legal estate at common law in the same manner as a feoffment would have done, and does not operate as a bargain and sale deriving its effect from the statute of uses (*Thatcher v. Omans*, 3 Pick. 521, 532 (1792); *Carr v. Richardson*, 157 Mass. 576, 578). In making a feoffment with livery of seisin, the words "bargain and sell" were effectual words of conveyance (*Bentcombe and Parker's Case*, 1 Leonard, 25), and a feoffment for a money consideration was actually a bargain and sale of the land. So it would seem that, since the Act of 1697, there has been no room for a bargain and sale transferring only a use that is executed by the statute of uses, when a present estate in the land is conveyed.

FORM 1.

For conveyance of an estate in fee simple to commence at the death of the grantor ^(a)

KNOW ALL MEN that I Samuel Hawes of &c. in consideration of the sum of \$650 (six hundred and fifty dollars) to me paid by Elizabeth Cook of &c. (hereinafter called the Grantee) the receipt whereof is hereby acknowledged do hereby grant unto the Grantee and her heirs and assigns All those two pieces of land situate &c. first a piece of land &c. secondly &c.

To have and to hold the premises hereby granted unto the Grantee and her heirs and assigns to my use during my life without impeachment of waste ^(b) [but so that I shall not be at liberty to cut the wood on the last mentioned piece of land] ^(c) And after my death [upon condition that she continues to keep my house and take care of me during her and my joint lives] to her and their use forever

And I do hereby covenant with the Grantee that I am lawfully seised of the premises hereby granted That they are free from all incumbrances That I have good right to grant the same as aforesaid And that I will warrant and defend the same against the lawful claims and demands of all persons

In witness whereof I the said Samuel Hawes have hereunto set my hand and seal the day of in the year

Signed sealed and delivered
in presence of

(a) This form, including the clauses in brackets, carries into effect the intention of the deed in *Trafton v. Hawes*, 102 Mass. 533, without involving the questions raised in that case. Cf. also the conveyances in *Gale v. Coburn*, 18 Pick. 397, and *Breicer v. Hardy*, 22 Pick. 376.

(b) As to impeachment of waste, see *Wms. Settlement*, 185, 223, 231; *Wms. R. P.* (13th ed.) 23-25; (22nd ed.) 116-118; 1 *Tiffany R. P.* ss. 246, 252; *Noyes v. Stone*, 163 Mass. 490; *Young v. Haviland*, 215 Mass. 120, 124; *Billings v. Taylor*, 10 Pick. 460.

(c) For other forms of restrictions as to waste, see 2 *Key & Elph. Conv.* (3rd ed.) 576; (9th ed.) 656.

FORM 2.

For conveyance of an estate for life with remainder in fee simple, deriving its effect from the statute of uses.^(a)

KNOW ALL MEN that I E. F. of &c. in consideration of \$1000 (one thousand dollars) to me paid by A. R. of &c. (hereinafter called the Grantee) the receipt whereof is hereby acknowledged do hereby grant unto the Grantee and his heirs All that piece of land situate &c.

To have and to hold the premises hereby granted unto the Grantee and his heirs to the use of the Grantee during his life without impeachment of waste And after his death to the use of his two sons D. R. of &c. and G. R. of &c. and their heirs and assigns

And I do hereby covenant^(b) with the Grantee^(c) that the premises hereby granted are free from all incumbrances made or suffered by me And that I will warrant and defend the same against the lawful claims and demands of all persons claiming through or under me

In witness whereof &c.

(a) Cf. *Chenery v. Stevens*, 97 Mass. 77, 85; *Burton's Compendium*, 47.

(b) The liability of the heirs of the covenantor is regulated wholly by statute, and it is not necessary to mention them (*Hall v. Bumstead*, 20 Pick. 2, 3; *Bullard v. Moor*, 158 Mass. 418, 425).

(c) The covenants should be made with the grantee to uses and then they enure with the land to the successive *cestuis que use* (5 Byth. & J. Conv. (4th ed.) 279; 1 Dav. Conv. (4th ed.) 116). It is not necessary to mention the heirs or assigns of the grantee.

NOTE ON THE ADMISSION OF ALIENS TO THE BAR (continued from page 110).

practise unless they have shown sufficient interest in the institutions of this country to complete their citizenship. The statute does not confer an absolute right to be admitted, so that legislation does not appear to be essential in regard to the matter, although the question may be asked why the statute should be retained which suggests that men may be admitted before they complete their citizenship. But as the matter of admission is ultimately to be decided by the Court, after considering all the circumstances which bear upon "moral character," "sufficient acquirements and qualifications," should not peculiar care be exercised during the war, at least, in the consideration of applications of aliens, and might it not be a reasonable requirement, under the circumstances, that they should complete their citizenship before admission, as the statute expressly recognizes the ultimate inherent jurisdiction of the Court to admit or reject or "otherwise determine" upon such grounds as it considers proper and reasonable, whether mentioned in the statute or in the report of the bar examiners or not? May not a special inquiry into each individual "alien" case be advisable?

The writer is also informed that under the practice of the naturalization authorities it is possible for men, such as Chinamen, for example, to take out their first papers, although under the law they can never legally complete their citizenship. It is, therefore, possible under present regulations, unless special examination is made, for men to be admitted to the bar who cannot become citizens.

F. W. G.

FORM 3.

For conveyance of an estate for life with remainder in fee simple, operating at common law.

KNOW ALL MEN that I E. F. of &c. in consideration ^(a) of \$1000 (one thousand dollars) to me paid by A. R. of &c. (hereinafter called the Grantee) the receipt whereof is hereby acknowledged do hereby grant unto the Grantee ^(b) All that piece of land situate &c.

To have and to hold the premises hereby granted unto the Grantee during his life without impeachment of waste And after his death the granted premises shall go and remain ^(c) to his two sons D. R. of &c. and G. R. of &c. and their heirs and assigns

And I do hereby covenant ^(d) with the Grantee and as separate covenants ^(d) with the said D. R. and G. R. that the premises hereby granted are free from all incumbrances made or suffered by me And that I will warrant and defend the same against the lawful claims and demands of all persons claiming through or under me

In witness whereof &c.

(a) At common law, if there was no consideration, the use would have resulted to the grantor in the absence of an express declaration of the use (1 Sand. Uses, 60, 97; Gilbert Uses, 422), but this effect is now prevented by 1912, c. 502, s. 15.

(b) The words "and his heirs" should not be added here, for they would be inconsistent with the subsequent limitation to him for his life, and would make it nugatory (*Pyncheon v. Stearns*, 11 Met. p. 316; Challis R. P. (3rd ed.) 411). The deed in *Simonds v. Simonds*, 199 Mass. 552, was subject to this objection as a conveyance at common law, but the difficulty was obviated by the subsequent words, "to their use," which had the effect of limiting uses successively for life and then in fee simple as specified in the *habendum*, although at common law the *habendum* was ineffectual (*Sammes' Case*, 13 Rep. 64; Gilbert Uses, 436 478).

(c) The word "remain" is the technical word used in limiting the future estate, which is called a *remainder*, because the land, after the termination of the particular estate, *remains* to the future holder instead of reverting to the grantor (2 Maitland's Coll. Papers, 178, 180 (6 Law Q. Rev. 25); 2 Pol. & Maitland Eng. Law, 21). See the forms in Madox Formulæ Angl. 401-412.

(d) As the grantee of the particular estate and the remaindermen take different estates, the covenants are entered into with them separately.

RIGHTS OF VENDOR OF ARTICLES DELIVERED UNDER CONDITIONAL SALE AGAINST ONE CLAIM- ING UNDER VENDEE.

A delivers possession of a chattel to B under contract of conditional sale; that is, title is to pass from A to B, as soon as B has complied with a certain condition, usually payment of the agreed price in instalments, which condition B has agreed to perform. Until such time title is to remain in A. Very often, but not always, there is a clause in the agreement to the effect that B may not sell, mortgage, transfer the possession of the chattel or suffer it to be attached, before B has fully complied with the condition. Suppose before the condition has been complied with in accordance with the agreement, B does sell, mortgage, or deliver the chattel to C, or allow it to be attached in a suit by C against B. What are the rights and remedies of A so far as C and the possession of the chattel are concerned?¹

In the first place the rule is well established that neither replevin nor tort, whether in the nature of trespass or trover, lies unless at the time of suit in the case of replevin, or of the act complained of in the case of tort, the plaintiff had possession or the right of immediate possession of the chattel as against the defendant.² And under the ordinary declaration which sets forth that "the defendant has converted to his own use the property of the plaintiff," the same facts are required to be proved as under the action of trover at common law.³ If, however, the plaintiff is not entitled to possession of the property, but has an interest therein

¹ The limits of this study, which is based on Massachusetts Reports, Vols. 1-225, exclude a number of cases where much the same question has arisen; e.g., in the case of ordinary bailments for hire (*Hardy v. Reed*, 1850, 6 Cush. 262; *Oliver Ditson Company v. Bates*, 1902, 181 Mass. 465; *United Shoe Machinery Co. v. Holt*, 1904, 185 Mass. 97), or of consignments with the right on the part of the consignee either to sell as his own or to return the goods (*Patten v. Clark*, 1827, 5 Pick. 5; *Meldrum v. Snow*, 1830, 9 Pick. 441), or of bailments for hire coupled with the right, but not the obligation on the part of the bailee to purchase (*Raymond Syndicate v. Guttentag*, 1901, 177 Mass. 562). Under the latter designation, however, there are several cases on the boundary line, in that though the transaction is on its face a mere lease or a bailment for hire coupled with the right to purchase, the courts have treated it as in fact a conditional sale (*Fairbank v. Phelps*, 1839, 22 Pick. 535; *Blanchard v. Child*, 1856, 7 Gray, 155; *Cottrell and Sons Co. v. Carter, Rice & Co.*, 1899, 173 Mass. 158). Under such circumstances, those cases are considered as falling within the boundaries of this article. Furthermore, the case will not be considered of goods sold under condition subsequent rather than condition precedent, that is where title of the chattel immediately upon its delivery from A to B passes to B, subject upon the happening or failure to happen of a certain condition to shoot back into A (*Hubbard v. Bliss*, 1866, 12 Allen, 590).

² *Ayer v. Bartlett*, 1829, 9 Pick. 146; *Vincent v. Cornell*, 1832, 13 Pick. 294; *Fairbank v. Phelps*, 1839, 22 Pick. 535; *Hill v. Freeman*, 1849, 3 Cush. 257; *Newhall v. Kingsbury*, 1881, 131 Mass. 445; *Robinson v. Bird*, 1893, 158 Mass. 357, 360; *Raymond Syndicate v. Guttentag*, 1901, 177 Mass. 562. Compare *Whitcomb v. Tower*, 1847, 12 Met. 487.

³ *Raymond Syndicate v. Guttentag*, *supra*.

which has been damaged by the defendant, an action in tort lies in the nature of the common law action of trespass on the case.⁴

A. REPLEVIN WHERE C CLAIMS UNDER ATTACHING CREDITOR OF B.

1. Even in the absence of special stipulation in the contract of sale between A and B, if the goods are attached in B's possession as belonging to B by the latter's creditor, it has been held that A may replevy the goods; (a) from the attaching officer,⁵ without any demand upon B or the officer,⁶ at least if B is in default as regards compliance with the terms of the condition at the time action is brought; (b) from the purchaser at an execution sale on a writ against B;⁷ (c) from one who has receipted to the attaching officer for the goods;⁸ (d) and from an assignee in bankruptcy of B who has taken over the defence of the action which had been brought against the attaching officer four days before B went into bankruptcy.⁹

In *Blanchard v. Child* it was expressly held that no demand was necessary to enable the plaintiff to maintain the action,

⁴ *Ayer v. Bartlett*, 1829, 9 Pick. 156.

⁵ *Hussey v. Thornton*, 1808, 4 Mass. 405; *Marston v. Baldwin*, 1822, 17 Mass. 606; *Hill v. Freeman*, 1849, 3 Cush. 257; *Tyler v. Freeman*, 1849, 3 Cush. 261; *Nichols v. Ashton*, 1892, 155 Mass. 205.

⁶ *Hill v. Freeman*, *supra*; it is to be noticed that in all the cases just cited except *Nichols v. Ashton*, the condition was that B furnish a satisfactory note or else pay cash on delivery, under which circumstances, according to Metcalf, J., in *Hill v. Freeman*, on p. 260, "the possession of the buyers, under the delivery which was made to them, was the constructive possession of the plaintiffs." *Cp. Com. v. O'Malley*, 1867, 97 Mass. 584. See also *Salomon v. Hathaway*, 1879, 126 Mass. 482. In *Reed v. Upton*, 1830, 10 Pick. 522, the condition was that B pay A the sum of \$200 by Sept. 1, 1828, the chattel being delivered into B's possession in May, at which time B gave A his note for \$200 payable on or before September 1st. B had paid nothing on the note up to September 1st; he had paid \$100 by Feb. 11, 1829, on which date the chattel was attached by C, a deputy sheriff on a writ against B. A demanded the machine of C before he had the writ of replevin served against the latter. By agreement of the parties "if the Court should be of opinion that the property of the machine was in the plaintiff, the defendant was to be defaulted; otherwise the plaintiff was to be non-suit." Defendant defaulted. *Shaw, C.J.*, p. 525: "It was further urged that there was no stipulation for the return of the property in any event, and therefore no expectation that it was to be returned. But this conclusion does not follow. It was no doubt expected that the note would be paid and then the sale would be completed; but failing that, if no property vested in the bargainee, the machine remained the property of the plaintiff, and after the term stipulated for the use of it, the right of possession would follow the right of property, and the plaintiff's title both to the property and possession remained the same as if no such contract had been made."

⁷ *Blanchard v. Child*, 1856, 7 Gray, 155, in which the purchaser was also the attaching creditor.

⁸ *Robinson v. Besarick*, 1892, 155 Mass. 141.

⁹ *Kenney v. Ingalls*, 1879, 126 Mass. 488. In this case the condition was the giving of an endorsed note which B failed to deliver, and the only question discussed is whether A had waived the condition before the goods were attached as belonging to B. It does not appear whether or not any demand was made on the attaching officer before the writ of replevin issued.

because as the Court said (p. 157), "there was a wrongful sale of the plaintiff's property by the bailee in denial of the plaintiff's right, participated in by the defendant, who claimed to hold the property by a title inconsistent with and adverse to the plaintiff. This amounted to a conversion; and the plaintiff having the general property in the chattel, thereby became entitled to its immediate possession." The facts of this case were as follows: A delivered an omnibus to B under an agreement that the latter might take it and use it, and that it should become his property upon the payment of \$150, but if he failed to pay that sum, it should remain the property of A, and B should pay a reasonable price for its use. No time of payment or terms for its use were ever agreed upon, and no part of the price was ever paid. After its seizure by the officer as B's property upon suit by C against B, and before sale on execution to C, the attaching officer and C's attorney had notice that it was A's property, but there was no proof of demand. Under these circumstances it would seem that B was not in default under his agreement with A so as to give A the right of immediate possession.¹⁰ The fact that the attaching officer had knowledge of A's interest in the property was not considered a material factor in an earlier case.¹¹ Apparently, however, the Court considered in *Blanchard v. Child* that such knowledge combined with C's knowledge of A's claims made the sale wrongful and raised an implication that C held possession of the omnibus by a title inconsistent with and adverse to the plaintiff so that the necessity for a demand was obviated.¹²

In *Robinson v. Besarick, supra*, A sold and delivered a desk to B on a written contract of conditional sale, the title to remain in A till the desk was paid for by instalments. It does not appear either that there was an express condition giving A the immediate

¹⁰ *Fairbank v. Phelps*, 1839, 22 Pick. 535, 539; *Day v. Bassett*, 1869, 102 Mass. 445, 447.

¹¹ *Ayer v. Bartlett*, 1829, 9 Pick. 156, 157.

¹² Cp. *Edmunds v. Hill*, 1882, 133 Mass. 445, 447. It is to be noticed that though in the headnote and in the first paragraph of Mr. Justice Bigelow's opinion in *Blanchard v. Child*, the transaction is spoken of as a "sale of the omnibus on a condition," the transaction seems rather to have been a lease with the right of the lessee to buy, as there was no obligation on the part of B to buy, if he chose instead to pay a reasonable price for the use of the omnibus. In fact when Bigelow, J., speaks of the lack of necessity of a demand to enable the plaintiff to maintain the action he speaks of B as a "bailee" rather than a vendee. Under such circumstances, if the sale to C be regarded as absolute rather than as a sale of B's interest in the property, possibly the case can be upheld under the statement of law made by Loring, J., in *United Shoe Machinery Company v. Holt*, 1904, 185 Mass. 97, 101: "Possession, or an immediate right to possession, is necessary to maintain equitable replevin as well as an action of trover or a writ of replevin, but where a bailee misuses the subject of the bailment, as he does in case of an absolute sale transferring the whole property, the bailment is ended and the general owner has an immediate right of possession on which he can maintain trover."

right of possession if the desk was attached before the condition was fully complied with, or, though the desk had been less than half paid for when it was attached on a writ against B, that the latter had failed to pay any instalment then due. The attaching officer placed the desk in the possession of C, a public warehouseman, who gave him a warehouse receipt for it. A demanded the desk from C, who refused to deliver the same, whereupon A brought a writ of replevin. The Court, in holding that replevin lay against C, said (p. 143), ". . . an officer who attaches goods on a writ against one who is not the owner of them is a trespasser. Replevin may be maintained by the owner without a demand against one who takes title by purchase from the officer."¹³ The Court does not consider the point whether one who has the right of possession and a right to get full title on performance of certain conditions, in the fulfillment of which he is not in default, has or has not a special property interest in the article which may be attached.¹⁴

2. There does not seem to be any Massachusetts case where the Supreme Judicial Court has held that A may not maintain replevin against C when C claims as or under the attaching creditor of B.

B. TRESPASS OR TROVER WHERE C CLAIMS UNDER ATTACHING CREDITOR OF B.

1. It is difficult to determine the rule governing the case where trespass or trover or conversion is brought by A against one who took the chattel, claiming as or under an attaching creditor of B. There are three cases in the books where such action has been successfully maintained.¹⁵ In *Barrett v. Pritchard*, the only point considered was whether title had passed from A to B. As it had not, it was assumed without discussion that the defendant was liable to A. The writer rather doubts that *Whitcomb v. Tower* would be followed to-day in the same form of action, as B had possession of the chattels attached at the moment of attachment, on the farm of which B was lessee under an unexpired term, although A had reserved title to the chattels until B had paid the

¹³ See *Heath v. Randall*, 1849, 4 Cusb. 196, on p. 196: "It seems that such a conditional sale, though accompanied with an actual delivery for a special purpose, will not vest the property, so that it may be attached by a creditor of the vendee."

¹⁴ Cp. *Newhall v. Kinsbury*, 1881, 131 Mass. 445.

¹⁵ *Barrett v. Pritchard*, 1824, 2 Pick. 512, trover against assignee of B, who was also attaching creditor; *Whitcomb v. Tower*, 1849, 12 Met. 467, trespass against attaching officer; *Robinson v. Way*, 1895, 163 Mass. 212, conversion against attaching creditor. *Whitcomb v. Tower* is not cited in any subsequent Massachusetts case.

rent reserved, which B had failed to do. The Court says, page 490, "Under the form of the lease, it required no further act of the lessor to vest in him the property in the articles, and he may therefore hold them, as against an attaching creditor. He had the right of property and the constructive possession, and may therefore well maintain this action for the wool and lambs." A had demanded of the constable after the attachment, not the return of the goods, but the money due him from B as rent under the lease. In *Robinson v. Way*, C attached a desk as B's while B was in default under his contract of purchase under the instalment plan, by reason of which default A was entitled to immediate possession of the desk. C told the officer to put it where A could not find it, which facts, according to Mr. Justice Holmes, "make out a plain case for the plaintiffs without the need of a demand."

2. There is an equal number of cases where action of trover has been held not to lie on the part of A against an officer who had attached the goods as belonging to B, on the ground that at the moment of bringing suit, A was not entitled to possession against B.¹⁶ All three cases have one point in common. At the moment of attachment, although B had not paid in full, still he was not in default under the terms of his agreement with A unless, in the absence of express condition, the attachment itself constituted such a default. In *Ayer v. Bartlett*, before suit was begun and after maturity of the first instalment note given by B to A which B failed to pay, A made demand upon the officer for the property with which demand the officer was unable to comply as he had sold the property on execution sale before the maturity of the note.¹⁷ In *Newhall v. Kingsbury*, B's first instalment came due August 15th. C attached the machine on July 9th and sold it on execution August 22d. A's writ against C is dated July 28th. The Court held that B "after the delivery to him, had a rightful possession which the plaintiffs could not interfere with until a failure by him to perform the condition. He had an interest in the property which he could convey, and which was attachable by his creditors, . . . at the time the plaintiffs commenced this suit, there had been no breach of the condition, and they had no right of possession." Neither attachment, therefore, nor sale on execution is considered to be such a breach of B's contract that A is entitled to immediate possession of the chattel, which holding

¹⁶ *Ayer v. Bartlett*, 1829, 9 Pick. 156; *Fairbank v. Phelps*, 1839, 22 Pick. 535; *Newhall v. Kingsbury*, 1881, 131 Mass. 445. In the first two instances, the chattel had been sold on execution by the defendant officer before A brought suit; in the last, the attachment preceded, but the sale followed A's starting his action.

¹⁷ *Cp. De Young v. Andrews Company*, 1913, 214 Mass. 47.

seems to be in conflict with the dictum quoted above from *Robinson v. Besarick*, 1892, 156 Mass. 141.¹⁸

C. ATTEMPTED DISTINCTION BETWEEN CREDITOR OF AND PURCHASER FROM B.

1. In an early case there is some talk to the effect that A's rights in the chattel as against B's creditors may depend on whether or not the demands of the creditors originated before or after B received possession of the article. The reasoning suggested was that since A gave B an opportunity to get a false credit he should be estopped to set up his title against subsequent creditors.¹⁹ It was, however, soon decided that unless the transaction arose out of a fraudulent design by A to give B a false credit, A was not barred of his right of possession as against B's creditor, even though the latter extended the credit in the belief that B's possession was synonymous with ownership.²⁰ And, to-day, in the absence of fraud, A's rights in the chattel are protected against any third person, even though A went so far as to give B an unconditional bill of sale upon the basis of which B secured credit.²¹

2. Even after A's rights against those claiming as or under attaching creditors of B had been determined, there were intimations by the courts that the case might be different if B had purported to sell the article to a *bona fide* purchaser without notice. Peculiarly enough, the dicta are of contradictory import. In *Hussey v. Thornton*, 1808, 4 Mass. 405, 407, it is said that A's rights against such a purchaser would be less than against a pre-existent creditor of B. In *Ayer v. Bartlett*, 1829, 9 Pick. 156, 160, and *Fairbank v. Phelps*, 1839, 22 Pick. 535, 539, the argument runs as follows: since the attachment is in spite of and not because of B, the latter has not exercised any rights of ownership as against A, wherefore there has been no conversion on B's part, B's right of possession under the contract has not been lost, and C claiming under B stands in as good a position as the latter against A; ²² if, on the other hand, B had purported to sell the goods to C, such conduct would have been unlawful, and might have been considered as a putting an end to the contract on B's part, and a revesting by operation of law of the right of imme-

¹⁸ See also *Raymond Syndicate v. Guttentag*, 1901, 177 Mass. 562, 564.

¹⁹ *Hussey v. Thornton*, 1808, 4 Mass. 405, 407.

²⁰ *Ayer v. Bartlett*, 1827, 6 Pick. 71, 77.

²¹ *Zuchtmann v. Roberts*, 1871, 109 Mass. 53.

²² *Cp. Wade v. Mason*, 1859, 12 Gray, 335.

diate possession in A, so as to enable him to maintain trover against C. That the purchaser from B would be liable in trover to A, at least after demand by the latter, seems to have been assumed without discussion in *Dresser Manufacturing Company v. Waterston*, 1841, 3 Met. 9. In *Hill v. Freeman*, 1849, 3 Cush. 257, 259, however, it is said that whether or not a *bona fide* purchaser from B could hold the goods against A in a replevin suit brought by the latter, remained an open question. Finally, *Coggill v. Hartford & New Haven Railroad Company*, 1854, 3 Gray, 545, an action of replevin, squarely decides that a purchaser from B is in no better position than a creditor of B. According to Bigelow, J., B acquires no property in the goods, but is only a bailee for a specific purpose with a bare right of possession which carries no right to sell. As he has no title he can give none to C.

D. REPLEVIN WHERE C CLAIMS AS A PURCHASER FROM B.

1. After *Coggill v. Hartford and New Haven Railroad Company*, *supra*, a long line of cases follows wherein replevin has been held to lie by A against a vendee or mortgagee or other purchaser from B, or one who claims under such purchaser, when at the time suit was brought B was in default under the terms of his contract with A, so that the latter still held legal title, combined with, as the courts decided, right to immediate possession against C.²² In only two of these cases, *Sargent v. Metcalf and Hoe v. Rex Manufacturing Company*, was there any express agreement on the part of B not to transfer his rights in or possession of, or allow another to use the chattel pending the full performance of the contract.²⁴ In most of them B was in default under his agreement to pay or give security to A when he made the transfer to C.²⁵

²² *Sargent v. Metcalf*, 1855, 5 Gray, 306; *Gilbert v. Thompson*, 1856, 3 Gray, 550, note; *Deshon v. Bigelow*, 1857, 3 Gray, 159; *Farlow v. Ellis*, 1860, 15 Gray, 229; *Hirschhorn v. Canney*, 1867, 98 Mass. 149; *Armour v. Pecker*, 1877, 125 Mass. 143; *Wentworth v. Woods Machine Co.*, 1895, 163 Mass. 28, bill in equity by mortgagee of B to restrain A from taking, by writ of replevin or otherwise, certain planing mill machinery, bill dismissed; *Cottrell and Sons Company v. Carter, Rice and Company Corporation*, 1899, 173 Mass. 155; *Hoe v. Rex Manufacturing Company*, 1910, 205 Mass. 214. See also *Chase v. Pike*, 1878, 125 Mass. 117.

²⁴ In both these cases at the time suit was brought B was in default in performance of his agreement to pay.

²⁵ The exceptions are *Sargent v. Metcalf*, and *Cottrell and Sons Company v. Carter, Rice and Company Corporation*. In the last named case after B's mortgage to C, the former without C's knowledge surrendered to A all his rights in the machinery and A took possession thereof a considerable length of time before C made a tender to A of what remained due under B's original contract with C.

Though there is a discussion of the point in only one case, a demand on C for payment or for possession of the goods does not seem to be necessary when B is in default, as a condition precedent to bringing replevin. In some of the above cases, however, demand was made by A for either payment or the goods prior to bringing suit.²⁶

In *Cottrell and Sons Company v. Carter, Rice and Company Corporation*, 1899, 173 Mass. 155, A entered on B's premises during the continuance of the latter's default in payment and tagged the presses in question with A's name. The Court said (p. 160): "We think that this constituted a taking possession under the agreement, and that the subsequent conduct of the defendant in removing the tags and selling the presses under the mortgage and purchasing them at the sale constituted a wrongful interference with and unlawful detention of the plaintiff's property, and that the plaintiff could maintain replevin without any demand. *Salomon v. Hathaway*, 126 Mass. 482."

2. No cases have been found where A was not able to maintain replevin against the purchaser from B regardless of the purchaser's good faith and lack of knowledge of the contract relations between A and B, except one where the Court held that it was not improper to receive oral evidence either to the effect that A had waived the written conditions of sale, or that in spite of such written contract to which C was not a party, A had, by his course of dealings, expressly or impliedly authorized B to sell the chattel to C before A was paid in full.²⁷

²⁶ In *Coggill v. Hartford and New Haven Railroad Company*, 1854, 3 Gray, 545, demand was made on C for the goods. In *Sargent v. Metcalf*, 1855, 5 Gray, 306, where there was an express condition against transfer by B and an agreement that on B's failure to live up to any of the conditions, A might take possession of the chattels and treat them absolutely as his own, demand for possession of goods was made on B after the latter's transfer, in violation of his agreement, but not on C. In *Farlow v. Ellis*, 1860, 15 Gray, 229, demand was made on C for either compliance with the terms of the sale or a return of the goods. In five of the cases (*Gilbert v. Thompson*, 1856, 3 Gray, 550, note; *Deshon v. Bigelow*, 1857, 8 Gray, 159; *Hirschorn v. Canney*, 1867, 98 Mass. 149; *Armour v. Pecker*, 1877, 1:3 Mass. 143; *Hoe v. Rex Manufacturing Company*, 1910, 205 Mass. 214), though there is no discussion of the point, there is no evidence of any demand for the goods on either B or C before bringing replevin. In the first four of these cases B had purported to sell and deliver the goods to C. In *Hoe v. Rex Manufacturing Company*, where B had assigned his rights under the contract to C, who had not removed the goods from the premises, there was a provision in the contract that on default by B, the latter would afford to A access to the chattels for the purpose of removing the same, and would not make any claim for tort or trespass arising from such removal.

²⁷ *Spooner v. Cummings*, 1890, 161 Mass. 313.

E. TROVER OR CONVERSION WHERE C CLAIMS AS PURCHASER
FROM B.

1. Perhaps the most interesting line of cases and the one wherein most attention has been given to the nature of the contract between A and B, and B's rights arising thereunder, consists in actions of tort in the nature of trover or conversion arising out of B's transfer of the chattel by way of mortgage or sale to some third person.²⁸

In the first place, it seems clear that if in violation of an express condition in the contract against B's transferring possession or title without A's consent, B does make such a transfer to C and subsequently defaults in payment, whereupon A makes a demand upon C for the return of the property, compliance with which demand is refused by C, A may maintain action against C for conversion.²⁹ In the Sallinger case the defendant was a pawnbroker to whom the chattel had been pledged and who apparently had not exercised dominion over it up to the moment of the plaintiff's demand, further than by receiving it into his possession in violation of the vendee's contract with the vendor. The contract between A and B, besides containing the provision against transfer, provided that if B failed to make any payment when due or to keep any other of his agreements he should surrender the ring to A "without process of law or on demand." The Court, after verdict for A against C, uttered the dictum that even though B had defaulted, nevertheless, the action could not be maintained by A without his first making a demand upon C.

If, moreover, in the case where B has violated his agreement not to transfer title or possession without A's consent, C has himself exercised further dominion over the chattel by in turn selling it, acting either as owner or agent, to a fourth person, no demand apparently is required to be made upon him, prior to A's bringing action.³⁰ In *Carter v. Kingman* furniture was sold under condition "not to sell, convey, underlet or remove the articles from where they are leased" without first getting A's consent. B did

²⁸ The following are the cases where A has been allowed to recover in such form of action: *Dresser Manufacturing Company v. Waterston*, 1841, 3 Met. 9; *Burbank v. Crooker*, 1856, 7 Gray, 138; *Carter v. Kingman*, 1870, 103 Mass. 517; *Benner v. Puffer*, 1874, 114 Mass. 376; *Robinson v. Bird*, 1893, 158 Mass. 357; *Lorain Steel Company v. Norfolk and Bristol Street Railway Company*, 1905, 187 Mass. 500; *Sallinger v. Collateral Loan Company*, 1913, 215 Mass. 286. In only two of these cases, *Dresser Manufacturing Company v. Waterston* and *Robinson v. Bird*, does it definitely appear that B was already in default to A so far as payments under the contract were concerned when he made the transfer to C.

²⁹ *Sallinger v. Collateral Loan Company*, 1913, 215 Mass. 286.

³⁰ *Carter v. Kingman*, 1870, 103 Mass. 517; *Robinson v. Bird*, 1893, 158 Mass. 357. In *Carter v. Kingman* it does not appear on what date A began suit against C.

sell the furniture, without obtaining A's consent, to C who removed it before the day set for B's first payment to A, namely March 20. On A's learning of this transaction, whether before or after March 20, is not stated, he demanded the goods of C, who already had sold them to D. A sues C. On page 519, Chapman, C.J., says: "And the plaintiff may maintain this action without a demand. *Gilmore v. Newton*, 9 Allen, 171." In *Robinson v. Bird*, it definitely appears that B was in default in the matter of payment when he mortgaged the goods in question to C in violation of his agreement with A not to injure, sell, mortgage, or relet the goods or remove the same while rent remained due. A had the right under the contract if B did not make his payments to remove the goods from B's house without demand or notice. Afterwards when B was in default, both under the contract with A and the mortgage to C, the latter took possession under foreclosure and removed the property to D's public auction rooms. D as auctioneer sold the goods and delivered the proceeds to C less his commission, whereupon A sued D and was allowed to recover, although A had made no demand on D for the return of the goods and neither C nor D had any knowledge of A's rights until after D had paid over the proceeds to C.

There does not seem to be any case where it has been decided whether or not a transfer of title or possession from B to C in violation of B's express contract with A, where B is not otherwise in default and where C has not exercised dominion over the chattel otherwise than by accepting such transfer, furnishes in itself grounds for action of conversion being maintained by A against C, unless *Benner v. Puffer*, 1874, 114 Mass. 376, is such a case.³¹ That under such circumstances A could not maintain the action without at least making a demand upon C, is indicated by the dictum in *Sallinger v. Collateral Loan Company*, above referred to.

³¹ In *Benner v. Puffer*, 1874, 114 Mass. 376, where there was an express condition against the property's being removed or sold until paid for in full, it does not definitely appear whether demand was made on C for the return of the goods before suit was brought against C. Neither under the rule laid down in *Day v. Bassett*, 1869, 102 Mass. 445, 447, is it certain that B was in default in his payments to A, which were to be made from time to time according to B's ability, either at the time when B mortgaged the goods to C or when C with B's consent removed the goods to an auction house where a portion of them was found by A to whom B then owed about \$300. It is not clear that C had sold the remaining portion of the goods, nor that A made any demand upon him. Endicott, J., simply says (p. 378): "The condition not having been fulfilled, no title to the goods passed to the Meads, and they could not give a valid mortgage to the defendants."

See, on the other hand, *Sears v. Leland*, 1887, 145 Mass. 277, where the Court says: "It appears that Worthing was in possession of the mortgaged property (which was afterward attached by the plaintiff) under a conditional sale, although nothing had been paid thereon and the conditions of such sale had not been complied with. . . . The mortgagor, Worthing, having obtained property under a conditional sale, had a right to mortgage it

Even though it does not appear that there is any express condition in the contract between A and B to the effect that prior to payment in full B may not sell or mortgage or transfer possession of the goods to C, if B does make such a conveyance A may maintain action against C provided that, after payment has become due under his contract with B, A makes demand upon C for the return of the goods, which demand meets with a refusal.³² In *Burbank v. Crooker*, where the goods in question were the stock of a country store, there was an express agreement that B might have the right to sell goods at retail, from which possibly a condition against selling the stock in bulk might be inferred. The whole stock was sold at auction by C and his auctioneer D, after the sale had been forbidden by A who made demand upon C and D, either for the return of the goods or payment of the price, after the auction and before bringing suit against both of them. In *Lorain Steel Co. v. Norfolk Street Railway*, where C bought the goods on foreclosure of a mortgage given by B, the defendant's president in reply to A's demand for the property, payment of which was due and unpaid, wrote that if it had any of the articles it should refuse to deliver them. Braley, J., said on page 506: "This was evidence showing the exercise of dominion over the chattels, a denial of the plaintiff's title, and its exclusion from possession, and supports the finding of conversion."

There do not seem to be any cases where in the absence of an express agreement by B not to transfer the goods before payment in full, A has sued C, the transferee, after default in payment by B, without making a demand upon C for the return of the goods.

2. There is a group of actions of tort in the nature of trover or conversion, five cases in all, arising out of B's transfer of title by sale or mortgage to C, where it has been held that at the moment of bringing suit, C rather than A had the right of immediate possession of the chattel.³³ The most striking elements

and, in the hands of the defendant [the mortgagee], the security was a valid and subsisting one. He had the possession of the property, and the right to possession, and could dispose of the property with his right therein, even if the sale to him was liable to be defeated by non-performance of the conditions. *Day v. Bassett*, 102 Mass. 445; *Crompton v. Pratt*, 105 Mass. 255."

³² *Dresser Manufacturing Company v. Waterston*, 1841, 3 Met. 9; *Burbank v. Crooker*, 1856, 7 Gray, 158; *Lorain Steel Company v. Norfolk and Bristol Street Railway Company*, 1905, 187 Mass. 500. In the latter case the provisions of Revised Laws, Chapter 111, Sections 75 and 76, requiring the recording of conditional sales of street railway rolling stock, were held inapplicable.

³³ The following are the cases where A has not been allowed to recover in such action against C: *Vincent v. Cornell*, 1832, 13 Pick. 294; *Swallow v. Emery*, 1873, 111 Mass. 356. In the following, C has maintained the action against A, or an officer acting in behalf of A, who interfered with C's possession: *Day v. Bassett*, 1869, 102 Mass. 445; *Crompton v. Pratt*, 1870, 105 Mass. 255; *Currier v. Knapp*, 1875, 117 Mass. 324.

common to these cases are (a) that in none of them was there any express agreement on the part of B not to sell, mortgage, or transfer possession of the article before he had paid in full, and (b) that while in none of them had B paid in full before he made the transfer, still he does not seem to have been in default at that moment under his agreement in regard to payments.³⁴ In three of them, A had been paid in full at the time when he either brought suit against C or interfered with C's possession,³⁵ in one, B had tendered him the amount due after the transfer to C,³⁶ and in one, C had already transferred possession of the chattel to D before B was bound to pay under his agreement with A, and also before A had made demand upon him for the return of the chattel.³⁷

These cases, therefore, stand for the proposition that in the absence of an express agreement against transfer of title or possession by B, such transfer does not in itself work a forfeiture of B's rights of possession under the contract of conditional sale, so long, at least, as at the time of transfer, B, though he has not completed his payments to A, is not in default under his agreement.³⁸ In other words, in the absence of an agreement to the contrary, either express or to be implied from some particular condition of the contract of sale other than the condition that legal title shall remain in the vendor until the agreed price is paid in full, the vendee may, if not in default under the terms of the contract, sell and deliver the goods as though absolute owner without losing his rights under the contract, and by his so doing, the

³⁴ In *Chase v. Ingalls*, 1877, 122 Mass. 381, B mortgaged the goods to C after he had defaulted in payment. No express agreement by B not to convey appears, but A had the right of repossession if B did not keep up his instalments. The goods were thereafter attached as belonging to B. C sues the attaching officer in conversion. The Court says (p. 383): "Munroe (B) had the legal possession, and a right in the property, which he might convey. *Currier v. Knapp*, 117 Mass. 324. His mortgage passed to the plaintiff that right of property, with a corresponding right of possession, which was good as against Munroe, and against any one attaching the property as his. *Harrington v. King*, 121 Mass. 280."

³⁵ *Crompton v. Pratt*, 1870, 105 Mass. 255; *Swallow v. Emery*, 1873, 111 Mass. 355; *Currier v. Knapp*, 1875, 117 Mass. 324.

³⁶ *Day v. Bassett*, 1869, 102 Mass. 445.

³⁷ *Vincent v. Cornell*, 1832, 13 Pick. 294. A made demand on C after B was bound to pay under his agreement with A; cp. *De Young v. Andrews Co.*, 1913, 214 Mass. 47. It will be noticed that the only point of difference between *Vincent v. Cornell* and *Carter v. Klingman*, 1870, 103 Mass. 517, in which opposing results are arrived at, is that in the latter case there was an express agreement by B not to convey without the consent of A. Cp. *Ayer v. Bartlett*, 1820, 9 Pick. 156.

³⁸ When there is no particular time set for payment, A must make demand upon B for payment to put the latter in default. *Day v. Bassett*, 1869, 102 Mass. 445, 447.

purchaser from the vendee acquires all the latter's rights thereunder.³⁹

The conditional vendee, it is apparent, is in a much better position than the mere bailee for hire or lessee of whom it has been said that "in case of an absolute sale transferring the whole property, the bailment is ended and the general owner has an immediate right of possession on which he can maintain trover." (*United Shoe Machinery Company v. Holt*, 1904, 185 Mass. 97, 101.) It is to be noted also that the right of the vendee is not to be restricted merely to the purported assignment of his own interest, whatever it may be, as is the expression in several cases,⁴⁰ with the obligation on the assignee not to remove the article from B's premises,⁴¹ but it is a property interest which allows the conditional vendee either to mortgage the article,⁴² or to sell and deliver it outright,⁴³ subject to the conditional vendor's legal title.⁴⁴

In at least one respect the position of the conditional vendee is analogous to that of the chattel mortgagor, in that the legal title of the conditional vendor is held to be one for security only, liable to be divested on a mere tender of the amount due under the contract by the conditional vendee or the person claiming under the latter.⁴⁵

³⁹ There does not seem to be any case where in the absence of an express agreement not to transfer, B being in default of his payments, under the contract transferred title and possession to C, and then tendered payment to A before the latter either sued C or asserted dominion over the goods. Under the decisions, it would appear as though A would be bound to accept the tender.

⁴⁰ *Glaspy v. Cabot*, 1883, 135 Mass. 435, 440; *United Shoe Machinery Company v. Holt*, *supra*, at page 102.

⁴¹ As hinted in *Carter v. Klingman*, 1870, 108 Mass. 517, 520, in the attempt to distinguish the case from *Day v. Bassett*, 1869, 102 Mass. 445.

⁴² *Keepers v. Fleitmann*, 1913, 213 Mass. 210; *Federal Trust Company v. Bristol County Street Railway Company*, 1915, 222 Mass. 35, 47, 48; *Hurnanen, Admr., v. Clicks*, 1917, 228 Mass. 346. Compare *Benner v. Puffer*, 1874, 114 Mass. 376, 378, where there was an express condition against the goods being removed or sold, but not against their being mortgaged, and the Court seems to say that prior to his payment in full B can give no valid mortgage to C.

⁴³ In *Vincent v. Cornell*, 1832, 13 Pick. 294, in *Swallow v. Emery*, 1873, 111 Mass. 346, and in *Currier v. Knapp*, 1876, 117 Mass. 314, B purported to make an outright sale to C, coupled with delivery of possession. See *Hurnanen, Admr., v. Clicks*, 1917, 228 Mass. 346.

⁴⁴ No case on the point discussed in this study seems to have arisen under Revised Laws, Chapter 193, Sections 11-13, or under Acts of 1912, Chapter 271, which relate to conditional sales. In *Downey v. Bay State Street Railway*, 1916, 225 Mass. 281, 284, it is decided that the word "owner" in Acts of 1909, Chapter 534, Section 2, as amended by Acts of 1912, Chapter 400, Section 1, which refer to the registration of motor vehicles, "includes, not only persons in whom the legal title is vested, but bailees, mortgagees in possession, and vendees under conditional contracts of sale who have acquired a special property which confers ownership as between them and the general public for the purposes of registration."

⁴⁵ *Day v. Bassett*, *supra*; *Dame v. Hanson & Co., Incorporated*, 1912, 212 Mass. 134. Compare *Weeks v. Baker*, 1890, 152 Mass. 20, chattel mortgage. See, however, *Nichols v. Ashton*, 1892, 155 Mass. 205, which expressly declares that vendors under conditional sales are not bound by statutes relating to chattel mortgages in cases of attachment of the goods by the creditors of the conditional vendee on a writ against the latter. See, also, *Williston on Sales*, 1st ed., Section 579.

Then we have the recent case of *Dame v. Hanson & Co.*, Incorporated, 1912, 212 Mass. 124, which was a bill in equity praying that C be allowed to redeem from A certain horses which A had sold B under conditional sale and which B had mortgaged to the plaintiff. The condition of the sale was that if the horses or any part of them should be attached, or if B should sell, mortgage, pledge, or attempt to sell, mortgage or pledge any of the horses, or should fail to pay the note which B gave A, at maturity, A should have the right without any demand or notice to take immediate possession of said property and hold the same absolutely free from all claims or demands on the part of B. B mortgaged the horses to C, the plaintiff, at a time when not all the required payments had been made, but when none was due, giving C power of attorney to pay off any incumbrances on the property. Later B sold and delivered possession of the horses to D to whom C assigned his mortgage. Whether B was in default in respect to payments under his contract at that time does not appear. About three weeks later D made a tender to A of the amount due under the contract between A and B, which A refused to receive. The next day the assignment of the mortgage from C to D was cancelled, and two days later A took the horses, claiming the right to do so because of B's acts in mortgaging and selling the property. The day after that, the plaintiff tendered A the full amount due under the contract, which A refused to receive, whereupon this action was brought. Decree for the plaintiff upon paying the amount due. In the words of Mr. Justice Morton (p. 126): ". . . assuming that the title was in the defendant, it was held by it subject to the performance by (B) of the conditions named, and (B) had therefore a right or interest which he could and did convey in mortgage to the plaintiff. . . . Upon tender of the amount due by (B) or his assignee before possession was taken by the defendant, the title vested in (B) or his assignee. . . . The case differs from those cases relied on by the defendant where no right or interest whatever passed until the goods were paid for by the purchaser according to the contract. In *Cottrell & Sons Co. v. Carter, Rice & Co.*, 173 Mass. 155, possession was taken several months before a tender was made. In the present case possession was not taken till after the rights of the plaintiff to redeem had become fixed."

In other words, even where there is an express condition against a transfer by B before the contract price has been fully paid, and also an agreement by B that in case of default A may recover the

goods free of all claim by B, equity will allow B, at least if at the time of transfer no instalment had become due and remained unpaid, to sell or mortgage, and deliver the goods to C, and then force A to accept, in lieu of repossessing himself of the goods, the balance of the amount due under the contract if tender of such amount is made before A has repossessed himself of the goods.⁴⁶

The question then arises: If forfeiture in consequence of the violation of the condition against transfer may thus be avoided by equity, may not in the future the similar forfeiture arising upon failure to make an instalment payment when due be similarly avoided?

F. DAMAGES.

At present, however, the measure of damages in suits by A against C for conversion is the value of the goods at the time of conversion with no reduction for any sums previously paid by B under the contract of sale.⁴⁷ Neither is there any mitigation of damages if C offers at the trial to restore the article converted as A can "insist on payment in cash." (*Sallinger v. Collateral Loan Company*, 1913, 215 Mass. 266, 268.)

G. REMEDIES IN CONTRACT.

So far all the cases we have been considering lay in replevin or tort. It is to be presumed, however, though no such case has been found, that if C has converted A's goods and turned them into cash, A may waive the tort and sue C in contract for

⁴⁶ In *Wentworth v. Woods Machine Company*, 1895, 163 Mass. 28, where C, the mortgagee of B, failed to obtain a decree enjoining A from replevying certain machinery from C's possession, there is no evidence that C made any tender or offered to pay the balance remaining due under the contract between A and B.

In view of the above line of cases, suppose a case was once more to arise under Revised Laws, Chapter 208, Section 73, which imposes a criminal penalty for the conveyance with intent to defraud, of personal property by one in possession of it under a written and conditional contract of sale before performance of the condition precedent to acquiring title thereto; would the Court repeat its dictum, uttered in *Commonwealth v. Reed*, 1889, 150 Mass. 67, 68, that "the fact that the defendant sold a piece of property not belonging to him had a distinct bearing upon the intent of the defendant, and might afford a legitimate inference that it was fraudulent"?

⁴⁷ *Angier v. Taunton Paper Manufacturing Company*, 1854, 1 Gray, 621; *Colcord v. McDonald*, 1880, 123 Mass. 470; *Lorain Steel Company v. Norfolk and Bristol Street Railway Company*, 1907, 187 Mass. 500, 506. See, however, *Dresser Manufacturing Company v. Waterston*, 1841, 3 Met. 9, where A was allowed to recover against C, who bought without any knowledge of the agreement between A and B, only the value of the goods when delivered by A to B, who subsequently increased their value before selling them to C.

money had and received.⁴⁸ If C has retained and made use of the goods, although he has been guilty of conversion, supposedly under the doctrine of *Jones v. Hoar*, 1827, 5 Pick. 285, no contractual action will lie,⁴⁹ unless of course, C for a consideration expressly promises A to pay therefor.

JAMES M. ROSENTHAL,

8 Bank Row,
Pittsfield, Mass.

JULY 17, 1917.

⁴⁸ *Gilmore v. Wilbur*, 1831, 12 Pick. 120. See *Whitwell v. Vincent*, 1827, 4 Pick. 449.

⁴⁹ See, however, *Brownsville Main Slate Company v. Hill*, 1900, 175 Mass. 532. In this case A delivered slate to C on condition that title should remain in A till B had obtained C's acceptance of his order for the price, whereupon title should shoot into B. B never obtained the acceptance of such order, and C used the goods. There was some evidence in a letter that C promised A to pay for the slate as a debt of his own. A sues C to recover for the price of the slate on two counts, one for goods sold and delivered, and one on a special contract. Verdict for plaintiff. Exceptions overruled. The Court said, on page 535: "If we lay on one side this letter for the moment, it was competent for the jury to find that the delivery of the slate was a conditional delivery; that the condition had not been waived; that the title in the slate had not passed to Williams (B); and that, as the defendants used the slate as their own, they were liable to the plaintiff in this form of action."

NOTE ON THE POWERS OF THE CONSTITUTIONAL CONVENTION (continued from page 96).

this amount was paid to them in monthly instalments, which came to an end on November 1. The convention adjourned on November 28 to meet again after the legislature adjourns in 1918, and the question is whether they are to be restricted in accordance with the terms of the convention act, or whether they are to receive more compensation, and if so, how they are to get it. There is also a question of further expense for printing and publication of proceedings, debates, etc.

Mr. Hoar, in his recent book on "Constitutional Conventions," says, on page 177, "A convention may undoubtedly incur expenses for its legitimate needs. We have already seen that a convention can pledge the faith of the state for the expense of hiring a hall. But it is a far cry from pledging the *faith* of the state to pledging the *credit* of the state."

Whatever may be the reasons for or against further appropriations in the minds of men, there seems to be no occasion for misunderstanding as to which body has, and which body has not, the ultimate control over the public funds in this connection. It seems clear that the legislature has, and that the convention has not, except so far as authorized by the act under which it was called.

THE QUESTION OF FILLING VACANCIES.

The question as to filling vacancies, which is also being discussed, involves other considerations as to the construction of the convention act and the nature of the body which it called into being. As to this subject, see the debate in the convention of 1853, and the comment upon that debate in Hoar's "Constitutional Conventions," page 172. There is a concise statement of the nature and history of this problem, with notes, on pages 170-172.

Mr. Hoar says, on page 171:

"The power to be the judge of their own elections may carry with it by implication the power to fill vacancies. This, however, is denied by Jameson at considerable length. Jameson denies that a convention can itself fill vacancies in its own ranks because, as he says, that would render the convention *pro tanto* self-appointing; and for the same reason he denies its right to authorize the colleagues of resigning or deceased members to name their successors. No cases have arisen in which a convention has tried to do either of these things without being expressly authorized by the convention act.

"A different question is presented, however, when we consider whether a convention can issue precepts to the constituencies of retiring or deceased delegates, directing new elections to fill the vacancies."

F. W. G.

“LEGAL OBLIGATIONS” OF THE COMMONWEALTH UNDER THE ANTI-AID AMENDMENT.

The constitutional amendment commonly referred to as the “Anti-aid” Amendment which was recommended by the Constitutional Convention and adopted by the people at the state election on November 6, 1917, contains a general prohibition of all appropriations of public funds for the assistance of private institutions of any kind, thus extending the provisions of the Eighteenth Amendment, which was originally adopted in 1855, and to the same extent restricting the scope of Article 2 of chapter 5 of the original constitution so far as the encouragement of education through “private societies” by appropriations is concerned, as distinguished from tax exemptions. The amendment (which is quoted in full elsewhere in this number) contains certain very limited exceptions as follows:

“Except that appropriations may be made for the maintenance and support of the Soldiers’ Home in Massachusetts and the free public libraries in any city or town, *and to carry out legal obligations, if any, already entered into.*”

The words in italics relative to “legal obligations” did not appear in the amendment as originally reported to the convention by the Committee on the Bill of Rights, which framed the amendment. The occasion for inserting the words was the vigorous debate centering about the resolves of 1911 and of 1912 by which the state agreed to appropriate certain sums of money each year during a period of ten years upon certain specified conditions for the Massachusetts Institute of Technology and for the Worcester Polytechnic Institute. Several delegates protested that the amendment as reported by the committee without any recognition or provision for the carrying out of the agreements of the state contained in these resolves would put the state in the position of repudiating its clear obligations deliberately entered into, and that Massachusetts should not be placed in so humiliating a position. One answer which was made to this argument was that if these two institutions were legally entitled to the continuance of the appropriations under the resolves referred to they would be protected by the Constitution of the United States, which prohibited a state from impairing the obligation of contract. A question was raised whether they were legally enforceable contracts, and certain delegates suggested that under the circumstances in these two

cases the state should not be placed in the position of quibbling about the questions whether there was a strictly legal contract or not, and that these two resolves should be specifically excepted. Perhaps the most effective speech in favor of some provision to protect the Commonwealth from the appearance of repudiating its obligations was made by delegate Bryant of Milton. As soon as he concluded his speech Judge Morton suggested an amendment by inserting the words above quoted in italics, allowing appropriations "to carry out legal obligations, if any, already entered into." The Committee on the Bill of Rights accepted this amendment, and after further debate it was permanently fixed in the resolution as submitted and adopted by the people.

Both during and after the debate the suggestion was freely circulated as coming from competent lawyers that this clause included in the amendment, on the suggestion of Judge Morton, did not cover the cases of the Massachusetts Institute of Technology and the Worcester Polytechnic Institute because there was no binding contract in either of these cases, and one of the reasons freely circulated was that one legislature could not bind another legislature.

The two resolves in question are as follows :

CHAP. 78.—RESOLVE IN FAVOR OF THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

Resolved, That there shall annually be paid from the treasury of the commonwealth to the Massachusetts Institute of Technology, for the term of ten years, beginning with the first day of January, in the year nineteen hundred and twelve, the sum of one hundred thousand dollars, to be expended under the direction of the corporation of said institute for the general purposes of the institute: *provided, however*, that the payment for the year nineteen hundred and seventeen and for the following years shall be conditioned upon the presentation of satisfactory evidence to the governor and council that the said Massachusetts Institute of Technology has received, by bequest or gift from other sources, the sum of one million dollars in addition to all the funds held by it on the day of approval of this resolve. In consideration of said payments and during the continuance thereof, the Massachusetts Institute of Technology shall maintain eighty free scholarships to be granted by the board of education to residents, or minor children of residents of Massachusetts who, upon examination conducted under such rules and regulations as the president of the said institute may prescribe, shall be found to possess the qualifications fixed for the admission of students to the institute. Two such scholarships shall be available annually for properly qualified candidates from each senatorial district, but if there be less than two properly qualified candidates in any senatorial district, such number of scholarships, less in amount than two from each district, may then be distributed by the board of education among the other senatorial districts. Candidates for these scholarships shall make application to

the board of education before the first day of July in each year, and shall forward to that board the approval in writing of the senator from the district in which the candidate resides. In awarding the scholarships preference shall be given to properly qualified candidates who are otherwise unable to bear the expense of tuition.

All acts and resolves and parts of acts and resolves heretofore passed authorizing the annual appropriation of funds by the commonwealth for the maintenance of free or state scholarships in the Massachusetts Institute of Technology, or prescribing the conditions under which such scholarships shall be awarded, are hereby repealed.

The Massachusetts Institute of Technology shall transmit each year copies of the annual report of its president to the General Court.

The eighty half scholarships now in force, as shown by the records of the Massachusetts Institute of Technology, shall continue in full force and effect until the end of the course for which they were given, after which time all future scholarships shall be filled under the regulations and conditions herein prescribed.

Approved May 20, 1911.

CHAP. 87.—RESOLVE IN FAVOR OF THE WORCESTER POLYTECHNIC INSTITUTE.

Resolved, That there shall annually be paid out of the treasury of the commonwealth to the treasurer of the Worcester Polytechnic Institute for the term of ten years, beginning with the first day of September, nineteen hundred and twelve, the sum of fifty thousand dollars, to be expended under the direction of the corporation of said institute for the general purposes of the institute: *provided, however*, that the payment for the year nineteen hundred and seventeen, and for the four following years shall be conditioned upon the presentation of satisfactory evidence to the governor and council that the institute has received by bequest or gift from other sources property amounting in value to three hundred and fifty thousand dollars in addition to the property held by it on the day of the approval of this resolve. In consideration of such payment and of the grant made by chapter fifty-seven of the resolves of the year eighteen hundred and sixty-nine, the Worcester Polytechnic Institute shall maintain forty free scholarships, of which each senatorial district in the commonwealth shall be entitled to one full scholarship, if a candidate is presented who is otherwise unable to bear the expense of tuition. In case no such candidate appears from a senatorial district, then a candidate may be selected from the state at large to fill the vacancy, and he may continue to hold the scholarship annually until a candidate is presented from the senatorial district unrepresented. The scholarships shall be awarded to such pupils of the public schools of Massachusetts as shall be found upon examination to possess the qualifications prescribed for the admission of students to said institute, and as shall be selected by the board of education, preference in the award being given only to qualified candidates otherwise unable to bear the expense of tuition. Chapter five hundred and sixty-two of the acts of the year nineteen hundred and ten is hereby repealed.

Approved April 30, 1912.

While the debate was in progress, having listened to it from the gallery, the writer discussed the legal aspects of the situation in letters, copies of which were sent to several members of the convention. The suggestions contained in these letters were based upon general principles and not upon any exhaustive study of authorities. It is not assumed that they had any influence on the result in the convention, but while the prohibition of appropriations under the Anti-aid Amendment does not go into effect until October 1, 1918, yet, as the matter is of peculiar importance and interest from various points of view, the extracts from these letters relating to the legal problem are here reprinted, just as written, for the purpose of informing the bar and the public of the way in which the matter was presented to the minds of some members of the convention, and of challenging an answer to the conclusions expressed. While the legislative problem of an appropriation may not arise until 1919, the discussion of the matter now while it is recent may be of assistance in some way to those who are to deal with the subject.

It should be said that in making these suggestions the writer has no more personal interest in either of the institutions referred to than any other member of the community. He never attended either institution and never knew of the existence of the resolves discussed until they were called to his attention during the debate in the Constitutional Convention. Accordingly, these letters contain a purely professional discussion of a matter of public interest and importance.

EXTRACTS FROM LETTERS.

AUGUST 11, 1917.

"As I read resolves number 78 of 1911, and 87 of 1912, the express conditions of those agreements having been complied with to the letter, those agreements would be binding upon an individual if made by him. If they would be legally binding upon an individual they must be legally binding upon the state. There is no question of agency involved, for the supreme contracting power of the government — the legislature — made the contract directly within their constitutional powers. The question of power being clear there can be no difference between the legal results of the acts of an individual and the acts of the state as a contracting party.

"But I understand the doubt is raised whether one legislature has the power to bind another legislature. I submit that question is irrelevant to the question of legal liability. The question is not whether one legislature can bind another legislature, but

whether any legislature can bind the state. If any legislature can bind the state, then the question of the succeeding legislatures is . . . whether the legislature will pass appropriations to meet the existing and established legal liabilities of the state. Neither the courts nor anybody can force a legislature to vote an appropriation to meet undisputed liabilities. The history of congress and the French spoliation claims is a sufficient illustration of this. But it is the business of the legislature as representing the state under their oath of office to make appropriations to meet the legal liabilities of the state.

"As it seems to me clear to the point of demonstration that there is a legal binding contract here, it may also be worth while to point out to the convention that the state has expressly provided by statute, R.L., chapter 201, section 2, amended by 1910, chapter 645, for a special tribunal and special procedure for the establishment of such legal obligations against the state and for the certification to the governor of the amount found due with legal costs and 'the governor shall draw his warrant for such amount on the treasurer and receiver-general, who shall pay the same from any appropriations made for the purpose by the general court.' There would be no occasion for anybody to go to the supreme court of the United States because there would be no question of any statute impairing the obligations of the contract which would arise. The only question would be one of the inaction of the legislature in not making an appropriation to meet an existing liability. Neither the supreme court of the United States nor any other power, except the sense of official responsibility of the legislature and the force of public opinion, could make them vote that. But I venture to say that if Judge Morton's language goes into this amendment no serious argument can be made before the Ways and Means Committee of the legislature next year to prevent the continuance of the appropriation, and that if such an argument is made and listened to the matter could be disposed of very promptly by a petition under chapter 201 of the Revised Laws.

"It seems hardly necessary to go into the history and scope of chapter 201. It provides for the presentation 'of all claims at law or in equity against the commonwealth.' The original statute prior to 1887 provided for the presentation of claims 'founded on contract for the payment of money.' This was not broad enough (see *Wesson v. Commonwealth*, 144 Mass. 60; *Milford v. Commonwealth*, 64), and the legislature passed chapter 246 of 1887 substantially in the present broad language, and in *Nash v. Commonwealth*, 174 Mass. 335, at 339, the Court said, 'The effect of the statute is to make the commonwealth answerable down to the judgment in its own courts for any just and legal claims against it . . . exactly as though it were a private individual.' And in *Murdock Grate Co. v. Commonwealth*, 152 Mass. at 31, it speaks of the statute as providing 'a convenient tribunal for the determination of claims of character which civilized governments have always recognized although the satisfaction of them has been

usually sought by direct appeal to the sovereign, or in our system of government, through the legislature.'

"If an authorized agent of the state like the Metropolitan Water or Sewerage Board or some other body had made a contract like that contained in these resolves within their powers there could be no question that the state would be liable. There can be still less question when such a contract is made by the only power that could authorize such a subsidiary board to make a similar contract — the legislature. (See also *Sampson v. Commonwealth*, 202 Mass. at 332; *Burr v. Massachusetts School for Feeble Minded*, 197 Mass. 357; *McArthur Bros. v. Commonwealth*, 197 Mass. 137.)"

AUGUST 15, 1917.

"In *Carey Library v. Bliss*, 151 Mass. 364, the Court decided that the legislature could not authorize the town to change the methods of administration of the Carey Library fund provided by the will, the terms of which had been accepted by the town, because trusts of that will as accepted by the town constituted a contract which could not be impaired.

"The resolves now in question contain evidence upon their face that the specific object of the resolves was to induce bequests and gifts 'from other sources.' The date specified for the fulfillment of this condition was placed in the middle of the ten years, obviously in order to give time for the campaign and for the news of the act to be spread about and for people to consider and make up their minds and arrange things to raise the money. This is the only reasonable interpretation of the provision in the act and being the only reasonable interpretation the act necessarily bears internal evidence of its purpose, that is to give the Institute time to communicate the offer of the state to every person who should be induced, according to the express intention on the face of the act, to give money in reliance upon the promise of the state. Obviously also as a practical and necessary circumstance which cannot be ignored in the interpretation of any contract this money was promised with the practical expectation and intention that plans might be made by the institute to carry out its educational purposes in reliance upon the promise of the state, plans which, of course, they would be warranted in acting upon as soon as they felt satisfied that they had complied or would comply clearly with the conditions of the resolve. This practical object of allowing the Institute to plan to carry out its purpose in reliance upon the promise is the thing which brings the resolves within the constitutional power of the legislature. It is this purpose which is so fully within Article 2 of chapter 5 of the constitution. This purpose and clear and practical consideration and condition necessarily induced by the resolves must be considered. It could not be ignored by the Court, for it is the most important part of the consideration in the whole business, the moving cause of the passage of the resolves.

"We are dealing with an act of the legislature, the moving cause of which was to carry out the purposes of Article 2 of chapter 5. That was the real consideration to the state, and the way in which this resolve was drawn to cover a ten-year period is adapted to carry out that purpose because it is the purpose of the condition inserted for the purpose of inducing gifts from other sources which form an additional consideration for the promise of the state when complied with.

"We have, therefore, a promise by the state based upon the double consideration expressed by the language of the resolves as a whole that the Institute may circulate the promise of the state as an inducement to other people which places the state in the position of a guarantor that if other people give upon its inducement it will carry out its promise, and the second consideration that the Institute might plan for the development of its educational purpose in reliance upon the promise of the state and of the gifts from other persons when the specific condition was complied with. Here we have a double-barreled consideration all of which has been completed by the strict performance of the condition (and without considering yet the question of the scholarships); you have therefore not only a contract which could be enforced by the Institute, but I should think it could also be enforced under chapter 201 of the Revised Laws by a representative body of those persons who contributed to the fund as a result of the inducement deliberately held out by the state. They would have an interest in the enforcement of the agreement of the state for the benefit of the Institute."

AUGUST 16, 1917.

"I do not believe that there is a single decision in Massachusetts which can be relied upon as casting serious doubt on the legal liability in these cases. If you have heard of any such decision referred to by those who express doubt, I should be very glad to have an opportunity to examine that decision. I do not attribute any particular importance to my opinion, but I do think that this question of law can be and should be thrashed out to a practical finish by somebody, and I challenge any one to produce a Massachusetts authority with any facts parallel to the facts in this case in which it has been held that there was no liability.

"As I said yesterday, the case which you put of A agreeing to give B ten dollars if C would give B ten dollars is not a parallel case. The state would have no constitutional authority to make any such appropriation for public money for private purposes.

"The individual situation which it does resemble is that A promises in writing to give B \$100,000 a year for ten years for the purpose of helping him to carry on his scientific school on condition that eighty of the sons, daughters, nephews, nieces, or other relatives of A shall be given free tuition annually at B's institution, and on the further condition that before the end of the fifth year and before the sixth payment becomes due, B shall produce evidence satisfactory to X that \$1,000,000 has been added to B's

school fund by gifts from other sources which could be induced by the use of the express written promise of A given for the deliberate purpose of inducing such gifts in order to carry out A's desire that B's school should be developed and improved because he believed it to be a great public benefit, and incidentally wished eighty members of his family to receive the benefit of the institution. At the end of five years the conditions have been carried out to the letter, and in the sixth year A is asked to make his sixth payment.

"It seems to me no more abbreviated, hypothetical statement of the facts can be used as a test of liability, and on such a statement of facts is there any doubt whatever that a Massachusetts Court would require A to make the sixth payment? If there is any such doubt in any one's mind based on any authority, I should like to see the authority. Would it not be enforced on the application of B, a trustee for educational purposes? Would it not be enforced on the application of the other subscribers who relied upon the express published promise of A, and thereby expressly contracted with him themselves for the benefit of the educational purpose for which B was trustee? Their sole object in so contracting with A by contributing to the acceptance of A's offer being to help the purposes for which B was trustee, those subscribers, acting through a representative number of them, hold their right to enforce A's liability in a fiduciary capacity for the purposes of B's institution, and they can enforce that in the same manner which is described on pages 487, 488, in the case of *Boyden v. Hill*, 198 Mass. Whether the proceeding is legal or equitable in its nature is immaterial to the present question. In either case the claim is presented by petition under chapter 201."

Criticism of the views expressed in the foregoing extracts will be welcomed.

F. W. G.

A TEST OF HISTORICAL ACCURACY.

The Secretary has just received from the West Virginia Bar Association a copy of Volume 23 of the reports of that organization, containing the proceedings at the annual meeting on July 5-6, 1917. In this volume there is printed an address delivered before that association, entitled "The Power of the Courts to Make Law and to Annul Legislation," by Sherman L. Whipple, Esq., of Boston.

In the course of this address, on pages 94, 95, appears the following passage:

"Furthermore, it is a fact (apparently little known) that no American constitution (except the comparatively recent ones of your own state and its sister state, Virginia) gives to the court the power to declare legislative enactments unconstitutional. Every other American constitution, I believe, is silent on the subject. The debates upon the Federal Constitution indicate that the framers of that instrument did not intend to grant such power to the Supreme Court, and did not suppose they had done so. The exercise of this power was a jurisdiction which necessarily had to be assumed by some tribunal, and the court, being obviously the natural one to perform a duty not provided for in the text of the constitution, undertook the task. The right of the courts in this respect is now settled by long continued acquiescence, but it is well to remember in discussing the expediency of the courts exercising the power, not only that the authority was originally assumed and not originally granted, but that it is a power not within the usual scope of judicial jurisdiction."

Without undertaking to discuss the general purpose and substance of Mr. Whipple's remarks, the following passages in the present constitution of Massachusetts, which have been there ever since 1780, are quoted for the purpose of comparison in the interest of historical accuracy, because there appears to be a good deal of misunderstanding on this point.

Chapter VI. of that constitution contains the following articles:

"ARTICLE VI. All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the

courts of law, shall still remain and be in full force, until altered or repealed by the legislature ; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.

"ARTICLE XI. This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land ; and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of the said laws."

The question arises, therefore, whether Mr. Whipple or any one else, if they were redrawing the constitution of Massachusetts for the purpose of expressing the duty of the courts to apply the test of constitutionality to legislation, could express in any clearer English the constitutional intention to impose a duty upon the courts that every individual citizen should have a constitutional right to demand that a court in Massachusetts should be constitutionally bound to read the constitution before it read a single legislative word, and to apply the constitution thus read as a test in the decision of his case as a "part of the laws of the land," and that this express constitutional intention should be made as clear and circulated as widely as the art of printing and binding could make it, by the express injunction to the state government that the constitution should be "prefixed to the book containing the laws of this commonwealth in all future editions of the said laws."

As to Mr. Whipple's suggestion that "the debates upon the Federal Constitution indicate that the framers of that instrument did not intend to grant such power to the Supreme Court, and did not suppose they had done so," the question arises whether Mr. Whipple has examined and considered carefully the material and references contained in the report of 1915 of the committee of the New York State Bar Association to consider this subject (which was printed as United States Senate Document No. 941, on motion of Senator O'Gorman) before making so positive a statement as that quoted above.

There is, to say the least, strong evidence which has been collected that the men in the Federal Convention not only intended to impose this duty upon the Supreme Court of the United States, but supposed that they had done so. The conviction has also been expressed elsewhere upon a study of contemporary evidence in Massachusetts, which has not been generally discussed in this connection, —

"That the central idea of the American Revolution, and of the

establishment of the United States of America and of the Commonwealth of Massachusetts, was the assertion of a body of principles and plan of government to be applied directly as law against anybody and everybody when occasion should arise, by an impartial and independent Court," and that the men who framed the early constitutions "were working not merely for a government of laws in the abstract, but for a government of applied laws," and that this was generally understood in Massachusetts and acted upon by the Courts, and recognized by other state officers immediately after the adoption of the Constitution of Massachusetts in 1780, with the approval of the community. (See "Constitutional History of the Supreme Judicial Court of Massachusetts," "Massachusetts Law Quarterly," II., Chapter 4.)

Mr. Whipple discusses the subject as though the question arose primarily as a question of "power," whereas the recorded history of the subject in Massachusetts, which is, perhaps, more continuous than elsewhere, from the time when Otis argued the writs of assistance in 1761, seems to show clearly that the intention of the American Revolutionists was primarily to create a *duty* to apply the "laws of the land."

Whatever may be any one's views of policy in regard to the continued existence or extent of this duty in the future it seems desirable that there should be a fair understanding of the actual facts, let them cut where they may, rather than that we should be asked "to remember," as Mr. Whipple suggests, as historical facts, things which careful examination of the evidence seems to indicate were not so. The suggestion that they were so has appeared from time to time apparently as an echo of some of the political thunder of the first decade of the nineteenth century, but this reëchoing tradition does not demonstrate its accuracy as a matter of fact, particularly as the original thunder subsided in the face of other political conditions which appeared to make the general recognition of the actual facts expedient.

Mr. Herbert Croly, in his book entitled "Progressive Democracy," refers to this result as follows:

"In spite of the embittered vigor with which the Jeffersonian Democrats protested against what they considered to be the usurpation of the Federal courts, they made no attempt, after they assumed power, to alter what had already become an established practice." . . .

"On the contrary, the subsequent representatives of partisan Democracy, the inheritors of the Jeffersonian tradition,

became the warmest and most unqualified advocates of a judicial decision of fundamental political controversies." (Pp. 135, 136.)

Those members of the bar who heard the address by Henry W. Dunn, Esq., in the series of lectures delivered at the Boston City Club in 1917, under the auspices of the Bar Association of the City of Boston, will remember that he discussed the history of this matter in considerable detail and concluded that "the evidence is overwhelming on the side of a general recognition of this power and a general acquiescence in it. . . . It was in fact no usurpation, but merely the exercise of a power, and the performance of a duty which practically all the statesmen, lawyers, and leaders of opinion of the day had, from the beginning, taken it for granted that the court would exercise and perform." (See also Beard, "The Supreme Court and the Constitution," 126, 127.)

Mr. Dunn also referred to the views of Jefferson at the time of the framing of the Constitution, because years later he was most violent in his criticism of the Supreme Court and of the exercise of this very power, which he attacked as "usurpation." He was in Paris at the time the Constitution was being framed, but he received copies of it and correspondence about it and wrote to Madison and others in this country commenting upon it, during the period when it was before the states for ratification, and in a letter to Madison dated March 15, 1789 (Jefferson's Writings, Ford Edition, Vol. V., page 81), he favored a Bill of Rights because of "the legal check which it puts into the hands of the judiciary."

As is generally known, following the lead of the Massachusetts Convention of 1788, the early amendments to the United States Constitution were promptly proposed and adopted, after its original ratification, to supply the lack of a Bill of Rights in the original instrument referred to by Jefferson.

F. W. G.

A SERIOUS PROBLEM IN REGARD TO ABSENTEE VOTING (WITH A NOTE ON THE MOVEMENT FOR ALIEN VOTING).

At the State Election on November 6, 1917, the amendment was adopted which was submitted by the Constitutional Convention providing for what was called "absentee voting," as follows:

"The General Court shall have power to provide by law for voting by qualified voters of the commonwealth who, at the time of an election, are absent from the city or town of which they are inhabitants in the choice of any officer to be elected or upon any question submitted at such election."

The subject of absentee voting was studied by the Attorney General and the Secretary of the Commonwealth as a special commission and reported upon favorably in 1916, House Doc. 430. The late J. H. Benton prepared a careful monograph on voting in the field during the Civil War. The commission, to compile information for the Constitutional Convention, prepared a Bulletin, No. 23, relating to the subject.

The amendment passed the convention and also passed the people in a generous spirit of allowing provision to be made for retaining the interest, and opportunity to express their interest in home affairs, of the thousands of our young men who are preparing to serve the country in the army and navy at the risk of their lives. There was comparatively little discussion of the practical working of the details of the measure, either in the convention or in the press prior to the election. At least so far as voting for candidates for office is concerned by our soldiers and sailors the amendment seems to be a desirable one when all things are considered. The amendment was supported, however, not merely for the soldiers and sailors, but on behalf of traveling salesmen, and traveling railroad employees, and others in similar occupations, who are unable to be at home on election day because of the nature and duties of their employment, and the Bulletin above referred to contains information from other states on this point. As to them, while it may still be desirable if some practical, workable method of fair voting by mail or otherwise is devised, yet the problem is one without the same sentiment and feeling which naturally attaches to the question so far as it relates to the soldiers and sailors. Its practical character is shown by the estimate that 20,000 voters are necessarily absent at every state election. See Bulletin 23, above referred to, at page 8.

There is, however, another very practical aspect of the amendment which has hardly been discussed at all in the convention itself or in the public press prior to the popular vote. The amendment allows the legislature to provide for such absentee voting on "any question submitted at such election," as well as candidates for office, and the legislative problem of providing for this and the practical results likely to follow from such a provision call for very serious consideration.

The question of the initiative and referendum has already been submitted by the convention to go on the ballot on November 5, 1918. If the Constitutional Convention meets again next summer and discusses the 170 odd matters upon its calendar which were not reached before it adjourned in November, a number of other measures, perhaps anywhere from 1 to 25 or more, may appear on the state ballot with the initiative and referendum. If the initiative and referendum should be adopted we might have any varying number of measures upon the ballot, either as proposed constitutional amendments or laws, at every annual election thereafter.

Now, whether the initiative and referendum is adopted by the people or not next November, the sentiment appears to be growing in favor of having the Secretary of the Commonwealth send, in advance of the election, by mail, to every registered voter in the state a pamphlet of information containing at least the exact language of the measure which is to appear upon the ballot, so that he may have an opportunity to inform himself and think about it whether he takes advantage of it or not, and whether he has heard it discussed or not. It is probable that such a pamphlet will be sent out by order of the Constitutional Convention containing information in regard to measures recommended by it if it meets again next summer and proposes further measures. It is of course a notorious fact to-day that upon most questions submitted at the polls the voters are not well informed, and many of them vote in ignorance or under the influence of catchwords.

The voters who are at home, however, before and at the time of election, at least, have an opportunity of reading information in regard to questions in newspapers, when there is any information, or of hearing the questions discussed at public meetings or among their neighbors.

Turning now to the absentee voters, particularly the soldiers and sailors on duty in the trenches, on the high seas, in the training camps, or under some other of the infinite occupations connected with the war, it may be, of course, that they will spend such spare time as they have for relaxation, or for writing to their

families, or for sleeping, or resting, in reading, considering, and discussing among themselves by the light of exploding shells or other modern devices, the pamphlets or the newspaper discussions about constitutional amendments or laws which may be submitted to the voters from time to time upon the ballot, whether we are to have the initiative and referendum or not. I, for one, however, do not see many of them doing this, and I think, from our general knowledge of men, we may assume that they would say to themselves, "We are doing our bit in our way. Why should we bore ourselves and tire ourselves when we get a little time off by reading about these things? That is the business of the men who stay at home."

This is not said with the slightest intention of criticism of the men in the army and navy. It is simply an appeal to common sense as the way in which most of us would probably act ourselves under similar circumstances, and, in considering problems of government for the future in Massachusetts, with the new conditions facing us incidental to and growing out of the war, it is essential that, while recognizing and appreciating all the public spirit which it is desirable to foster and encourage in our young soldiers and sailors, we should drop all theoretical cant about the way in which men ought to act and face the challenge of facts of the way in which we know most men do and will act.

Taking alone the cases of our soldiers and sailors, and, if we have woman suffrage by Federal amendment shortly, also our nurses, we shall be faced with the fact that if the right to vote upon measures as well as candidates for office is given to thousands of absentee voters during the war, some of the most important questions that have ever been submitted to the electorate of Massachusetts may be decided by a small majority of men in the trenches or in the camps who have neither heard, nor had any reasonable opportunity for hearing, the questions upon which they vote discussed, and whose duties are such that they will have had no reasonable opportunity of reading about the questions, even if some literature or casual newspaper discussion should reach them in time for them to read it before voting.

Is such a result one which should be invited, with our eyes open, by legislation in the name of an informed democracy? I am not arguing the question. I am stating it in order that others may argue it on either side. Bills to bring about this result are now before the legislature.

So far the question relates to soldiers and sailors and nurses. As to traveling salesmen or traveling women or railroad employees whose work now prevents them from attending the polls on elec-

tion day the question is a somewhat different one. If a man is at home most of the time prior to an election so that he has an opportunity for hearing and reading about questions to be voted upon and is merely obliged to be on the road during election day or to leave shortly before election day so that he is away at the time, he may have as full an opportunity to inform himself as those who are not in his situation. But as to those who are continually upon the road, particularly during the month or two before an election, so that they are so constantly beyond the borders of the state or away from the newspapers or other medium through which information is circulated in Massachusetts, so that they will not, as a practical matter, get any more knowledge or information about the questions than our soldiers and sailors will, the situation will be the same so far as that point is concerned.

The grant of power to legislate on this subject having been given by the people, upon the suggestion of the Constitutional Convention, the really difficult question as to policy and machinery in the light of the nature of the questions to be passed upon and of the privilege to be exercised by the so-called "absentee" voters has been left to the legislature, the abuse of which was one of the favorite occupations of a considerable number of the members of the Constitutional Convention during the summer. In performing this responsible duty is it not a serious question for the legislature, whether "absentee voting" should not be limited to candidates for office?

As already suggested, it is for the purpose of raising that question clearly for discussion rather than of arguing it that this note is written. The results of proposed legislation can be accepted more philosophically if we are sure that the facts are squarely faced beforehand.

The further question also arises, if the privilege of "absentee" voting is extended generally to measures as well as candidates so that the likelihood of the decision of important questions by small uninformed majorities of absentee voters is increased, does a new serious objection arise to the initiative and referendum on the ground that it would tend more and more to throw the government of the state upon the most fundamental questions into the hands of these majorities of absentee voters? Does not the question arise how far it is wise for Massachusetts on the strength of sentimental impulses, however generous, to gamble with the fundamental laws which are to govern her entire population? These questions also are intended to provoke discussion at a time when men are thinking of other things. We cannot afford to forget that the stage is set for the simultaneous first experiments

of Massachusetts in European war, woman suffrage, initiative and referendum, absentee voting, municipal trading, and all the other things which the Constitutional Convention may suggest in future.

Is it treason to democracy to ask the legislature and the people to consider for a moment whether we all know in which direction we are likely to be headed when all these experiments are tried at once?

F. W. G.

NOTE ON THE MOVEMENT FOR ALIEN VOTING.

There is also a movement, referred to by the President in his address, to extend the right to aliens who have declared their intention of becoming citizens. Three of such proposals are still before the Constitutional Convention, one (Convention Doc. 128) presented by delegate Harriman of New Bedford, another (Convention Doc. 286) presented by delegate Morrill of Haverhill, and another (Convention Doc. 287) presented by delegate Scigliano of Boston. On all these resolutions the committee on suffrage reported "ought not to pass." The subject was then referred to the committee of the whole, where it appears to be still pending for further consideration when the convention meets again.

As the newspapers indicate that the answers of drafted men to the recent questionnaire show that about 30 per cent or more of the young men registered in Massachusetts are aliens who have not become citizens, the collective political power which they might be given cannot be ignored, and the fact that the source of such power may tempt the efforts of more political leaders in future than it does to-day should be remembered. This is not intended as a criticism of the young aliens; but until men show sufficient information about our government to complete their citizenship it does not seem that they should be given the political power of voting. The extension of the voting privilege to a large body of such men means practically placing the balance of power on controverted questions in their hands, and it does not seem that that balance of power should be in the hands of aliens.

How much this consideration would weigh in a vigorous popular campaign on the issue under the initiative and referendum it is impossible to predict. One can only guess one way or another. But the problem is worth mentioning in connection with absentee voting problems, because it presents somewhat similar aspects, complicated by the possibility of some hostile interests.

F. W. G.

THE PROPOSED BILL RELATIVE TO THE SITTINGS OF THE FULL BENCH OF THE SUPREME JUDICIAL COURT.

Five judges of the Supreme Judicial Court traveled to Pittsfield for the September sitting of 1917, as required by statute, in order to do fifteen minutes' routine business, and traveled back. Judge DeCourcy referred to this fact at the dinner.

At the annual meeting on December 7, 1917, the following discussion took place:

MR. E. A. WHITMAN: Mr. President, in view of the . . . references of Mr. Justice DeCourcy to the visits of the Supreme Court to your town, and in view of the fact that brother Davenport announces that he has "hit the trail," I move that the incoming Executive Committee be requested to submit to the legislature a bill giving the justices of the Supreme Judicial Court the right to select in their discretion the places at which sittings of the full bench shall be held.

MR. GRINNELL: The situation is that the Association voted a year or two ago to present such a bill. That was very vigorously opposed by members of the bar from different counties. The legislature, after that bill had been before them a year or two, provided that all Essex cases should be heard in Boston, on the request of a large number of members of the Essex bar, returning by that act to the practice which existed back in 1859 or thereabouts. As to the other counties, no further action has been taken, but from a number of counties men have come to signify their belief in making a similar provision. The only question in my mind is as to the action of the Association, whether or not it is better for the Association to submit to the legislature a general act of that kind which might be acceptable in some counties and not in others, or whether it is better to proceed gradually by one county after another. But I see no objection to putting the bill in and then the legislature can do what it pleases and give us the whole or part of it. I merely wish to explain the legislative facts in the matter.

Judge SHELDON: I think there might be a misfortune in our passing such a vote at this meeting, at which a majority,

probably a large majority, of the members present practise either in Boston or its immediate neighborhood. I am heartily, from my own past experiences, in favor of the passage of such a bill. It is simply a question in my mind of the advisability of passing that resolution at this meeting. Accordingly, I will move that the matter be referred to the Executive Committee for such action as it may see fit to take.

Mr. DAVENPORT: Mr. President, a suggestion. I think perhaps I opposed that bill as long as any one here present, but I changed my mind about it a year or two ago. The suggestion I desire to make is this: If any such measure is passed each county ought to have a certain day in a certain month when hearings could be had for that county. I have this morning been before one of the justices of the Superior Court and asked him to order a case which was tried in July, sent to the Supreme Judicial Court for the January sitting, and he informs me that he has been importuned by the Chief Justice not to send any cases to the Supreme Court, to let them come in their ordinary way. That was new to me. I didn't get the case sent in to the January sitting and the result is that that particular case which was tried in July will have to go to next September or be submitted on briefs. In order to have it submitted on briefs all the counsel will have to agree, and you can always gamble that at least one counsel will not agree. There ought to be a specific month or months assigned for different counties.

The PRESIDENT: I was on the committee which investigated that subject a few years ago. One of the opponents of the suggestion was Frederick S. Hall of Taunton. The other day he talked the matter over with me and he told me that he withdrew his objection; he thought he was wrong then and thought there should be the change desired. You have heard the motion of Judge Sheldon that the matter be referred to the Executive Committee for action.

The motion prevailed.

NOTE.

In accordance with this vote the matter was considered by the Executive Committee at a meeting on January 11, 1918, and it was voted to authorize the Secretary to submit the following petition and bill on behalf of the Association:

PETITION.

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled :

The undersigned, citizens of Massachusetts, respectfully represent that there is need for legislation for more economical and efficient provision for the sittings of the full bench of the Supreme Judicial Court in order that the waste of judicial power may be avoided which now results from the strict statutory requirements that the full bench shall travel to different parts of the state in different counties to hold court whether there is any business to be done at such sittings or not, and pray for the passage of the accompanying bill or other appropriate legislation.

MASSACHUSETTS BAR ASSOCIATION,

By FRANK W. GRINNELL,

Secretary.

By authority of the Executive Committee.

HOUSE No. 698

Bill accompanying the petition of the Massachusetts Bar Association relative to the sittings of the Supreme Judicial Court. Joint Judiciary.

AN ACT

Relative to the Sittings of the Supreme Judicial Court.

SECTION 1. All cases and matters in any county that may be required to be heard and determined in the supreme judicial court by the full court shall be heard at such times and at such places as the court from time to time shall appoint with a view to the dispatch of business and the interest of the public. All such cases and matters shall be entered as heretofore provided, unless the court orders otherwise, and the court may make such rules or orders, general or otherwise, for the entry and hearing of such cases from time to time as the dispatch of business and the interest of the public may require.

SECTION 2. This act shall take effect upon its passage.

The proposal in the foregoing bill has been discussed in one form or another for thirty years or more. Recent history in regard to the discussion is contained in the report of the Com-

mittee on Legislation of this Association for 1914, pages 15 to 21, and circular number 1 of the same committee for 1915. It was further discussed by Mr. Grabil, the assistant reporter of the Supreme Judicial Court, in the February number of this magazine for 1916, pages 43 to 48, and the bill as presented to the legislature this year is in the form suggested by Mr. Grabil on page 45, which seems the simplest form in which it has yet been presented.

THE PROPOSED BILL RELATIVE TO APPEALS FROM THE PROBATE COURTS (WITH EXPLANATORY NOTES).

In his address at the annual dinner Judge DeCourcy called upon the bar, and in particular upon the Association, for a closer and more effective study of procedure and other matters relating to the courts.

In 1915, during the discussion of various questions relating to the courts Mr. J. L. Thorndike prepared a bill relating to the Probate Courts as a suggestion for the consideration of the bar. The bill is intended to avoid the duplication of trials on the facts in Probate cases. Copies of it were printed by Mr. Thorndike with explanatory notes and sent to all the Probate judges in the state and to a number of members of the bar for criticism, and the bill was revised in the light of suggestions then received. It was not, however, brought before the legislature.

As one response to the appeal of Judge DeCourcy, however, this bill has been submitted to the legislature this year for consideration and the bill has been printed for the convenience of the Judiciary Committee and others, with explanatory notes to various sections. For the information of the bar this bill with these notes is here reprinted in the form in which it is presented to the Committee of the Legislature. Section 11 has been redrawn, as shown by a note, in view of the Partition Act of 1917. The bill has not been presented upon the petition of the Association, but upon an individual petition. Suggestions or criticisms will be welcomed by the secretary.

F. W. G.

THE BILL AS ANNOTATED.

[This bill was prepared for presentation to the Legislature in January 1915, but, as other important matters relating to the courts were to be proposed, it was decided to postpone the introduction of this bill until another year.]

AN ACT

relating to Appeals from the Probate Courts.

[The Probate Courts were made courts of superior and general jurisdiction by 1891, c. 415, s. 4 (R. L. c. 162, s. 2), and it is proposed in this bill to put their decisions on the same footing as regards appeals as the decisions of the Superior Court in suits in equity, and to simplify some of the proceedings relating to estates subject to their jurisdiction.]

1. A person who is aggrieved by an order, decree, or denial of a Probate Court or of a judge of such court, in any proceeding commenced after this act takes effect, may within thirty days after the entry thereof appeal from the same to the Supreme Judicial Court and such appeal shall be heard and determined by the full court, which shall have the like powers and authority in respect thereof as upon an appeal in a suit in equity under the general equity jurisdiction.

[See R. L. c. 162, ss. 9, 10, as to present appeals; cf. as to equity, R. L. c. 159, ss. 19, 25. R. L. c. 162, s. 9, has "order, sentence, decree," &c., as in 1783, c. 46, s. 4, *sentence* being the name applied to a decree in the ecclesiastical courts (Coote Ecc. Pr. 631; Waddilove's Dig. 296), from which the probate jurisdiction was derived, but this name is not now in use.]

2. The appeal shall be pending before the full court as soon as it has been filed in the Probate Court and the proper copies of papers in the proceeding as specified in section 21 (twenty-one) of chapter 157 (one hundred fifty-seven) of the Revised Laws shall be prepared by the register and transmitted to the Supreme Judicial Court and entered in the docket of the full court.

[R. L. c. 159, s. 19; *Cobb v. Rice*, 128 Mass. 11, 12.]

3. Upon the appeal the judge by whom the order, decree, or denial was made shall report the material facts found by him if so requested by the appellant within four days after the appellant has notice of such order, decree, or denial, or otherwise such report shall be in the discretion of the judge.

[R. L. c. 158, s. 23.]

4. No oral evidence shall be exhibited to the full court upon the appeal, but the evidence and all questions relating thereto shall be subject to the like provisions as are contained in section 24 (twenty-four) of chapter 159 (one hundred and fifty-nine) of the Revised Laws and section 4 (four) of chapter 716 (seven

hundred and sixteen) of the acts of 1913 (nineteen hundred and thirteen) relating to suits in equity.

[R. L. c. 159, s. 24; 1913, c. 716, s. 4.]

5. A judge of the Probate Court by whom a case or a matter is heard for final determination may reserve and report the evidence and all questions of law therein for the consideration of the full court, and thereupon like proceedings shall be had as upon appeal. And if, upon making an interlocutory decree or order, he is of opinion that it so affects the merits of the controversy that the matter ought, before further proceedings, to be determined by the full court, he may report the question for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties.

[This corresponds to the power to report in equity (R. L. c. 159, ss. 27, 29), which has been settled by decision (*Nashua & Lowell Rld. Corporation's Case*, 169 Mass. p. 164).]

6. Sections 26 (twenty-six) and 28 (twenty-eight) of chapter 159 (one hundred and fifty-nine) of the Revised Laws shall be applicable to appeals in such proceedings as are above mentioned.

[Limit of revision of interlocutory decrees on final appeals, by s. 26. Leave to appeal out of time, by s. 28.]

7. The Probate Court may in any such proceeding, upon the application of a party and in accordance with the practice established by the Supreme Judicial Court in like cases, direct that any issues of fact shall be tried by a jury in the Superior Court for the same county, or, if there shall not be any regular sitting for such trial within three months after such order, or, by consent of the parties, in any other county. The form of such issues shall be settled in the Probate Court and certified copies of the issues and other material papers in the case shall be entered by the applicant in the Superior Court forthwith or within such time as the Probate Court may direct, but the same may be entered by any other party, and, in case the same shall not be so entered, the Probate Court may discharge the order for such trial. Upon the motion of any party in the Superior Court the issues shall be advanced for a speedy trial.

[The present law as to issues in probate matter on appeal is R. L. c. 162, ss. 25, 26, and in equity cases R. L. c. 159, ss. 36-38; cf. Land Court cases, 1910, c. 560, s. 6. As to the cases in which issues are directed, see *Doherty v. O'Callaghan*, 157 Mass. 90; *Fay v. Vanderford*, 154 Mass. 498; *Davis v. Davis*, 123 Mass. pp. 593-4.]

8. Questions of law arising upon the trial of any such issues may be considered and determined by the Supreme Judicial Court in the same manner and with the same effect as in actions at law tried in the same court.

9. In the case of any estate of a deceased person which is represented insolvent after this act takes effect, if the court, instead of appointing commissioners to receive and examine the claims of creditors against the estate, receives and examines such claims itself, the foregoing provisions of this act shall be applicable to the proceedings for the proof of the same and to appeals from the allowance or disallowance thereof, exclusively of the provisions of sections 11 (eleven) and 16 (sixteen) of chapter 142 (one hundred and forty-two) of the Revised Laws, but shall not be applicable to such proceedings or appeals in respect of the like claims against other estates previously represented insolvent.

10. No proceeding commenced in a Probate Court after this act takes effect shall be subject to any of the provisions of the sections next hereinafter specified of chapter 162 (one hundred and sixty-two) of the Revised Laws or any amendments thereof respectively, namely, sections 8 (eight), 9 (nine), 10 (ten), 11 (eleven), 13 (thirteen), 14 (fourteen), 18 (eighteen), 19 (nineteen), 25 (twenty-five), 26 (twenty-six), 28 (twenty-eight), or to so much of section 7 (seven) of chapter 141 (one hundred and forty-one) of the Revised Laws as relates to proceedings upon an appeal.

[These are the provisions giving and regulating the present right of appeal. The leave to appeal out of time provided for by the above mentioned ss. 13, 14, is provided for by s. 6 of this bill, which makes R. L. c. 159, s. 28 applicable in such cases.]

11. Section 27 (twenty-seven) of chapter 279 (two hundred and seventy-nine) of the general acts of the year 1917 (nineteen hundred and seventeen) is repealed.

[This repeals the section of the Partition Act 1917 providing for appeals in partition cases, and it is desirable that all probate appeals shall be regulated by the same provisions. The repealed section provides only for appeals on account of "any matter of law apparent on the record," but the matters of law generally do not appear on the record (e.g., *Hall v. Hall*, 152 Mass. 136; *Loud v. Brigham*, 154 Mass. 107), and, upon a case stated, inferences of fact could not be drawn on appeal according to 1913, c. 716, s. 5, because they are matters of fact and not of law (*Friedman v. Jaffe*, 206 Mass. p. 457-458).]

12. A decree or order of a Probate Court made in proceedings commenced after this act takes effect under the provisions of sec-

tion 33 (thirty-three) or 37 (thirty-seven) of chapter 153 (one hundred and fifty-three) of the Revised Laws shall in case of appeal be subject to the like provisions as are contained in section 17 (seventeen) of chapter 162 (one hundred and sixty-two) of the Revised Laws.

[Substitute for R. L. c. 162, s. 19, (am. 1907, c. 266) which with s. 18 is repealed by the above section 10, the decrees and orders being subject to appeal under s. 1 of this bill.]

13. This act shall take effect on the first day of September next after its passage.

THE BILL FOR A CONCILIATION SESSION OF THE MUNICIPAL COURT OF BOSTON.

Those who have been following the accounts in the reports of the Legal Aid Society and of the American Judicature Society, and other publications during the past few years of the experiments which have been successfully tried in Cleveland, Chicago, New York, and elsewhere, for the purpose of eliminating delay, unnecessary expense, and consequent injustice, particularly in dealing with small claims — a field for administration of justice under the conditions of modern life in which our existing method of procedure has broken down, or rather has proved itself inadequate — will be interested in the following bill drawn and introduced by Richard W. Hale, Esq., of Boston, with a view to an experiment in a special session of the Boston Municipal Court, with a preliminary investigation of a case before trial. It has often been said of some plans for the elimination of excessive procedure in dealing with litigation involving comparatively small amounts, that they are unconstitutional. There appears to be nothing unconstitutional in any aspect of the provisions of the following bill. It is simply another application of the same administrative idea that has long been in common use in the system of statutory interrogatories before trial, which in turn was a different form of the old plan of bills for discovery in the Chancery Courts. It is also directly in line with the administrative practice that has long existed in England of referring cases to masters or other officials before trial in order that they might deal with the interlocutory matters, and by bringing the parties and the issues of the case together in advance, eliminate unnecessary issues (thus in many cases eliminating the entire case) and bring out the issues which are in serious dispute for trial.

F. W. G.

HOUSE No. 590

Bill accompanying the petition of Richard W. Hale that provision be made for the speedy trial of causes in the municipal court of the city of Boston. Joint Judiciary. January 14.

AN ACT

To authorize a Special Session of the Municipal Court of the City of Boston for Conference of Parties and for Conciliation.

SECTION 1. The municipal court of the city of Boston may by rule provide for a special session for the trial of causes which it deems suitable to be heard for the purpose of conciliation or adjustment and for a partial trial of any cause in such session.

SECTION 2. At such partial trial it may by rule be made in order to hear the testimony of the plaintiff and the defendant, and to propound and answer the interrogatories provided for by section sixty-seven of chapter one hundred and seventy-three of the Revised Laws. When propounded at such a trial interrogatories may be oral and the answers may be required orally. The affidavit provided for by said section shall in such case not be necessary. Also to direct the immediate filing of particulars under section sixty-eight of chapter one hundred and seventy-three, and to default any party who does not file them. Also to require or permit offers of proof to be made by both parties. The court may require such offers of proof to be supported by affidavit.

SECTION 3. At such partial trial, it may be determined whether either party intends in good faith to prove and has reasonable ground to believe that he can prove, any fact the determination of which would be necessary for the disposition of the case.

SECTION 4. If it appears at such session that judgment may as a matter of law be entered for either party, that may be done.

SECTION 5. Said court may make such other rules as the court shall deem expedient for the object of securing speedy justice in such session without unreasonable expense.

SECTION 6. In any case which by rule or order is placed upon the list for such session costs may be taxed against either party, or for neither, or divided as the court shall in its discretion deem proper.

STATISTICS RELATIVE TO THE POPULATION, VOLUME OF BUSINESS, AND SALARIES OF JUSTICES, CLERKS, AND ASSISTANT CLERKS IN THE JUDICIAL DISTRICTS OF THE SEVERAL DISTRICT, POLICE, AND MUNICIPAL COURTS OF MASSACHUSETTS.

JANUARY 1, 1918.*

Prior to 1904 the salaries were determined by a multitude of special acts. In 1904 a Joint Special Committee of the General Court reported (1904, House Doc. 175) a uniform salary plan, based upon the population of the several judicial districts. Such a plan, while better than one based wholly upon a fluctuating and possibly artificial volume of business—a fee system in another form—is nevertheless unfair to courts in congested cities, which produce much more criminal business per capita, if not more civil business, than rural or residential districts. The plan reported was adopted with some changes.

The committee in 1904 made a conscientious attempt to collect statistics as to the business of different courts, but at that time no method of comparing the entire business of different courts had been devised. Our lack of judicial statistics in Massachusetts has prevented the various legislatures from 1904 to the present time from obtaining a comprehensive view of the business of these courts; and, consequently, some of the numerous special acts since 1904 that have modified the population plan have increased salaries in particular courts without any similar increase in other courts having a greater volume of business and about the same population.

By St. 1910, c. 501 (see also St. 1909, c. 357), provision was made for the automatic readjustment of salaries, on the basis of population, after each National and State census. That statute does not apply to the increases of population made by St. 1917, c. 302, which apparently was ineffective in changing the classes of the courts to which certain towns were annexed. Since St. 1917, c. 302, every city and town in the Commonwealth, except Nantucket, is within a judicial district.

The schedule provided by St. 1904, cc. 453, 454, as amended by St. 1912, c. 604, and St. 1917, c. 340, is as follows:

Municipal Court of the City of Boston (as raised by St. 1912, c. 649 and again by St. 1917, c. 262): Chief Justice, \$6,500. Eight associate justices, \$6,000. Two clerks, \$4,000. (All the foregoing raised \$500 in 1912, and the Chief Justice and associate justices raised \$1,000 more in 1917.) Assistant clerks, civil (St. 1913, c. 726; St. 1916, c. 69), 1st, \$2,700; 2d, \$2,200; 3d, 4th, \$2,000; 5th, 6th, 7th, \$1,700. Assistant clerks, criminal (St. 1913, c. 736; St. 1914, c. 666), 1st, \$2,700; 2d, 3d, \$2,200; 4th, \$2,000; 5th, 6th, \$1,700; 7th, \$1,600.

Boston Juvenile Court (created by St. 1906, c. 489, and salaries therein fixed): Justice, \$3,000. Clerk, \$1,500.

* Compiled by Henry T. Lummus, Esq., of Lynn, and published here in order that there may be a permanent record for the use of future legislators and other students of our judicial system. A new classification of courts and standardization of salaries have been reported to the General Court for 1918 by the Executive Council, acting under the authority of a legislative order of 1916. See 1916 Resolves, No. 94.

The other courts are classified as follows :

Class.	Population.	Salary of Justice.	Salary of Clerk prior to St. 1917, c. 340.	Salary of Clerk on acceptance of St. 1917, c. 340.	Salary of Asst. Clerk.
A	125,000 or more.	\$4,000	\$2,400	\$3,000	\$1,600
B	100,000 to 125,000	3,500	2,100	2,625	1,400
C	75,000 to 100,000	3,000	1,800	2,250	1,200
D	60,000 to 75,000	2,750	1,650	2,062	1,100
E	50,000 to 60,000	2,500	1,500	1,875	Below Class D, no salary for assistant clerk. See R.L., c. 160, § 11; St. 1904, c. 433; St. 1909, c. 357.
F	30,000 to 50,000	2,000	1,200	1,500	
G	20,000 to 30,000	1,800	900	1,350	
H	10,000 to 20,000	1,500	720	1,125	
I	Less than 10,000	900	540	675	
J	Dukes County only.	500	None.	None.	

It will be noticed that in general, until changed by St. 1917, c. 340, the salary of an assistant clerk is two-thirds that of the clerk, and the salary of the clerk is three-fifths that of the justice. The salary of the clerk, by St. 1917, c. 340, was made three-fourths that of the justice; but that statute has not gone into effect generally, because of the failure of several boards of county commissioners to accept it.

In 1904, when the courts were classified and the salaries were fixed, the salary of an associate justice of the Supreme Judicial Court was \$8,000 (now \$10,000), the salary of an associate justice of the Superior Court was \$6,500 (now \$8,000), the salary of the judge of the Land Court was \$4,500 (now \$8,000), and the salary of an associate justice of the Municipal Court of the City of Boston was \$4,500 (now \$6,000).

The first column of the following statistics gives the name of the court, its class, and any effective special acts relative to it. The courts are arranged in order of population.

The second column gives the judicial district, and its population according to the census of 1915.

The third column gives the total number of civil writs entered, for the several calendar years 1911, 1912, 1913, 1914, and 1915, and the average per year. The six rows of figures shown represent the foregoing, in the order named.

The fourth column gives the total number of poor debtor and equitable process matters begun, for the several calendar years 1911, 1912, 1913, 1914, and 1915, and the average per year, thus comprising six rows of figures.

The fifth column gives the total number of criminal cases begun, for the several years ending Sept. 30 in 1912, 1913, 1914, 1915, and 1916, and the average per year, thus comprising six rows of figures.

The sixth column gives the total number of criminal cases begun, other than cases of drunkenness, for the several years ending Sept. 30 in 1912, 1913, 1914, 1915, and 1916, and the average per year, thus comprising six

Court.	Population, 1915.	Civil Writs Entered.	Poor Debtor, etc.	Criminal Cases Other Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Busi- ness in Units.
Municipal Court of the Roxbury Dis- trict. (Class A. But see special act. Jus- tices \$4500, Clerk \$3000, 1st Asst. \$2000, 2d Asst. \$1500. St. 1914, c. 604; St. 1916, cc. 262, 263. St. 1917, c. 291. See St. 1917, c. 340.)	Roxbury district, 152,860	166 192 165 162 155 Av. 166	74 76 79 75 53 Av. 71	7763 8655 9173 8725 11,486 Av. 9160	3905 4087 4411 4119 6008 Av. 4246	414 426 441 408 410 Av. 440	15,258
First District Court of Eastern Middle- sex. (Class A.)	Malden, 48,907 Everett, 37,718 Methuen, 30,500 Melrose, 16,860 Wakefield, 12,781 146,795 (R.L., c. 160, § 2.)	1335 1363 1383 1297 1431 Av. 1362	583 498 548 460 486 Av. 515	2303 2412 2408 2407 2638 Av. 2452	1056 1212 1134 1166 1182 Av. 1150	112 110 114 112 94 Av. 108	11,658
Second District Court of Bristol. (Class A, except Justices \$4500. St. 1915, c. 286. See St. 1917, c. 340.)	Fall River, 124,791 Somerset, 3,777 Swansea, 2,558 Freetown, 1,663 132,389 (R.L., c. 160, § 2.)	734 772 757 797 999 Av. 612	98 59 53 42 59 Av. 62	3890 3602 3846 2460 2529 Av. 3265	1562 1566 1712 1776 1618 Av. 1647	373 387 352 323 409 Av. 375	9,846
Third District Court of Eastern Middle- sex. (Class A.)	Cambridge, 108,822 Arlington, 14,849 Belmont, 8,081 131,792	1082 1211 1183 1272 1473 Av. 1244	203 287 359 398 463 Av. 342	3697 4131 4168 4045 3929 Av. 3992	1820 2187 2416 2490 2144 Av. 2211	267 463 220 270 269 Av. 298	18,708
Police Court of Springfield. (Class B.)	Springfield, 102,971 West Springfield, 11,339 Agawam, 4,555 Long meadow, 1,782 East Long- meadow, 1,939 Hampden, 670 Ludlow, 6,251 129,507	1314 1271 1225 1824 1517 Av. 1370	91 60 83 62 69 Av. 73	3667 4017 3961 3342 3067 Av. 3915	1802 1841 1338 2227 1983 Av. 1834	47 82 300 208 164 Av. 160	12,765
Police Court of Lowell. (Class A.)	Lowell, 107,978 Fewksbury, 8,265 Billerica, 5,346 Dracut, 4,922 Chelmsford, 5,182 Dunstable, 362 Tyngs- borough, 967 127,022	597 603 627 613 587 Av. 585	29 47 35 53 53 Av. 43	4622 5326 5109 4856 5299 Av. 5048	1262 1506 1628 1633 1673 Av. 1540	68 122 148 71 111 Av. 104	9,807

Court.	Population, 1915.	Civil Writs Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Bust- neat in Unia.
Third District Court of Bristol.	New Bed- ford, 109,568	649	9	3571	1109	79	9,000
(Class A.)	Fairhaven, 6,277	649	16	3833	1312	126	
	Acushnet, 2,387	655	11	3977	1570	149	
	Dartmouth, 5,530	801	20	3796	1707	163	
	Westport, 3,262	772	23	3601	1541	106	
	126,824	Av. 705	Av. 15	Av. 3756	Av. 1448	Av. 125	
	(R. L., c. 160, § 2.)						
District Court of Southern Essex.	Lynn, 95,803	1296	278	3983	2190	77	14,700
(Class B.)	Swampscott, 7,345	1359	285	3800	2019	108	
	Saugus, 10,226	1528	337	4807	2157	56	
	Marblehead, 7,006	1576	313	5881	2301	35	
	Nahant, 1,387	1481	342	4554	1953	49	
	122,367	Av. 1444	Av. 311	Av. 4606	Av. 2124	Av. 65	
Municipal Court of the Dorchester District.	Dorchester district, 120,845	120	92	2061	1041	67	5,800
(Class B.)		163	155	2295	1253	70	
		137	120	3256	1153	125	
		153	150	3860	1496	153	
		179	135	3740	2078	56	
		Av. 150	Av. 130	Av. 3042	Av. 1404	Av. 94	
District Court of Lawrence.	Lawrence, 90,259	649	26	3555	1258	130	9,000
(Class B.)	Andover, 7,978	582	28	3918	1408	203	
	North An- dover, 5,956	710	38	3317	1273	203	
	Methuen, 14,007	725	58	3735	1582	125	
		767	40	4217	1557	160	
	118,200	Av. 687	Av. 58	Av. 3748	Av. 1416	Av. 164	
Police Court of Somerville.	Somerville, 86,854	538	96	1159	595	115	5,400
(Class C.)		567	132	1294	742	121	
		630	104	1345	775	135	
		651	86	1388	837	212	
		674	74	1354	704	304	
		Av. 612	Av. 98	Av. 1306	Av. 731	Av. 178	
District Court of East Norfolk.	Randolph, 4,734	548	80	2077	1134	149	7,100
(Class C.)	Brantree, 9,343	603	102	2228	1083	157	
	Cohasset, 2,800	669	145	2287	1197	103	
	Weymouth, 13,969	669	172	2293	1271	90	
	Quincy, 40,674	691	138	2375	1223	123	
	Holbrook, 2,948	Av. 636	Av. 127	Av. 2252	Av. 1182	Av. 124	
	Milton, 8,600						
	83,068						
First District Court of Essex.	Salem, 37,200	823	120	2460	1267	172	8,600
(Class C.)	Beverly, 22,959	917	145	2130	1094	114	
	Danvers, 11,177	942	166	2315	1235	142	
	Hamilton, 1,879	856	141	2372	1309	136	
	Middleton, 1,308	910	113	2223	1127	81	
	Topsfield, 1,173	Av. 891	Av. 137	Av. 2500	Av. 1204	Av. 129	
	Wenham, 1,068						
	Manchester, 2,945						
	79,709						

Court.	Population, 1915.	Civil Writs Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunkenness.	Delinquent Children Cases.	Average Annual Business in Units.
Municipal Court of West Roxbury District. (Class C.)	West Roxbury district, 79,237	69 59 68 58 70 Av. 65	23 36 27 30 24 Av. 28	1985 2757 3106 3665 3261 Av. 2955	875 1399 1588 2237 1692 Av. 1558	109 119 99 90 95 Av. 102	5,098
East Boston District Court. (Class C, with 2d Asst. clerk, \$1000, St. 1917, c. 154.)	East Boston district, 78,438	163 182 149 132 190 Av. 163	29 52 48 63 60 Av. 50	2806 2637 3256 3437 3880 Av. 3203	1431 1282 1578 1701 1821 Av. 1563	250 333 244 465 460 Av. 350	6,381
Police Court of Brockton. (Class C.)	Brockton, 62,288 Bridgewater, 9,381 East Bridge-water, 3,689 West Bridge-water, 2,741 78,009	527 573 489 651 758 Av. 600	66 98 74 94 123 Av. 91	2417 2639 2425 2522 2852 Av. 2571	1232 1363 1202 1251 1400 Av. 1290	81 60 37 76 79 Av. 67	7,177
Municipal Court of South Boston District. (Class D. But see special act. Justice \$3200, Clerk \$2500, Asst. clerk \$1500. St. 1916, c. 261. See St. 1917, c. 340.)	South Boston district, 72,866	133 74 63 78 81 Av. 86	16 17 18 20 18 Av. 18	5343 6150 8666 8860 8015 Av. 7487	2073 2442 3130 2850 2303 Av. 2566	192 376 342 358 372 Av. 328	11,175
Police Court of Chelsea. (Special act. Justice \$3000, Clerk \$1800. St. 1914, c. 547. See St. 1917, c. 340.)	Chelsea, 43,426 Revere, 28,178 68,604	351 372 326 359 279 Av. 337	33 58 55 68 57 Av. 52	4950 4091 3440 3257 4140 Av. 3982	1563 1296 1382 1722 1968 Av. 1581	49 91 62 178 208 Av. 116	7,584
Police Court of Holyoke. (Class D.)	Holyoke, 60,816	366 323 245 294 296 Av. 305	18 7 7 8 10 Av. 10	1804 2049 1631 1835 1484 Av. 1761	703 718 748 1002 707 Av. 771	72 51 51 70 131 Av. 76	4,227
District Court of Hampshire. (Class E.)	All the county except Ware, Enfield, Greenwich, and Prescott, 58,672	233 226 270 278 282 Av. 258	9 1 6 4 2 Av. 4	892 1115 1102 1140 1137 Av. 1077	314 525 482 529 485 Av. 467	26 20 44 37 56 Av. 37	2,916

Court.	Population, 1915.	Civil Write Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Busi- ness in Units.
Central District Court of Northern Essex.	Haverhill, 49,450 Groveland, 2,377 Georgetown, 2,058 Boxford, 714 West New- bury, 1,529 56,128 (St. 1912, c. 563, St. 1917, c. 302.)	506 540 458 563 559 Av. 525	23 32 17 14 13 Av. 20	2302 2110 1995 1825 2118 Av. 2088	792 786 682 588 574 Av. 684	67 121 69 90 31 Av. 70	5,580
District Court of Central Berkshire. (Class F.)	Pittsfield, 39,607 Hancock, 514 Lanes- borough, 1,089 Peru, 195 Hinsdale, 1,237 Dalton, 3,858 Washington, 275 Richmond, 564 Lenox, 3,242 Becket, 973 51,574 (St. 1917, c. 302.)	295 311 385 420 375 Av. 357	0 0 2 4 3 Av. 2	1964 2054 1297 1044 1336 Av. 1539	589 660 833 590 717 Av. 678	57 87 68 72 66 Av. 70	4,140
First District Court of Bristol. (Class E.)	Taunton, 36,161 Rehoboth, 2,228 Herkley, 985 Dighton, 2,499 Seekonk, 2,767 Easton, 5,064 Raynham, 1,810 51,514	274 264 265 269 331 Av. 280	5 13 12 23 18 Av. 14	1708 1688 1789 1959 1752 Av. 1779	446 417 583 722 479 Av. 529	25 31 20 0 54 Av. 26	3,780
Second District Court of Eastern Middlesex. (Special act, placed in Class E. St. 1917, c. 319.)	Watertown, 16,515 Weston, 2,342 Waltham, 30,154 49,011	222 365 356 472 466 Av. 376	53 72 75 65 70 Av. 67	1088 1279 1408 1387 1549 Av. 1342	578 661 615 643 663 Av. 632	61 64 62 82 76 Av. 69	4,120
Fourth District Court of Eastern Middlesex. (Class F.)	Woburn, 16,410 Winchester, 10,005 Burlington, 751 Wilmington, 2,330 Stoneham, 7,489 Reading, 6,805 North Reading, 1,292 45,082	305 299 357 339 346 Av. 337	43 44 58 50 47 Av. 48	944 986 1120 1110 1238 Av. 1080	490 474 581 615 693 Av. 571	50 50 65 63 76 Av. 61	3,560
Police Court of Fitchburg. (Class F.)	Fitchburg, 39,656 Ashbur- ham, 2,059 Lunenburg, 1,610 43,325	295 274 259 325 254 Av. 281	5 5 4 10 5 Av. 6	1605 1697 1798 1851 1870 Av. 1782	529 498 524 476 499 Av. 505	60 85 70 77 85 Av. 75	3,804

Court.	Population, 1915.	Civil Writs Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Busi- ness in Units.
Police Court of Newton. (Class F.)	Newton, 43,113	305 331 357 373 402 Av. 353	79 74 65 61 69 Av. 70	1005 916 893 946 909 Av. 934	606 478 531 532 552 Av. 540	29 125 79 72 81 Av. 77	3,538
District Court of Northern Norfolk. (Class F.)	Dedham, 11,043 Dover, 999 Norwood, 10,977 Westwood, 1,448 Medfield, 3,648 Needham, 6,542 Wellesley, 6,439 41,096	283 180 242 256 229 Av. 239	33 32 25 42 38 Av. 35	988 823 882 829 832 Av. 867	644 537 556 588 498 Av. 565	46 36 21 47 42 Av. 38	2,773
District Court of Franklin. (Class F.)	All the coun- ty except Orange, Er- ving, War- wick, Wen- dell, and NewSalem, 40,219	242 203 272 233 284 Av. 247	13 18 9 15 10 Av. 13	692 698 770 927 894 Av. 796	335 260 498 454 396 Av. 391	19 7 23 39 21 Av. 22	2,492
Municipal Court of Charlestown Dis- trict. (Special act. Jus- tice \$3200, Clerk \$1800, Asst. clerk \$1400, 2d Asst. clerk \$1200. St. 1912, c. 672; St. 1916, c. 195; St. 1917, c. 330. See St. 1917, c. 340.)	Charlestown district, 39,601	40 40 60 54 47 Av. 46	17 25 22 46 14 Av. 24	4589 4418 5196 5744 6460 Av. 5301	1153 1258 1396 1670 1776 Av. 1451	108 170 173 180 166 Av. 169	7,348
First District Court of Southern Worcester. (Class F.)	Sturbridge, 1,618 Southbridge, 14,217 Charlton, 2,213 Dudley, 4,373 Oxford, 3,476 Webster, 12,565 38,462	156 134 137 202 196 Av. 165	4 5 6 3 9 Av. 5	686 790 862 850 743 Av. 786	355 432 486 511 402 Av. 437	54 44 28 29 34 Av. 38	2,134
Second District Court of Plym- outh. (Class F.)	Abington, 5,646 Whitman, 7,520 Rockland, 7,074 Hingham, 6,264 Hull, 2,200 Hanover, 2,563 Scituate, 2,661 Norwell, 1,563 Hanson, 1,796 36,480	217 221 229 209 231 Av. 221	44 46 50 35 36 Av. 43	1234 1155 1383 1179 1294 Av. 1249	522 656 644 642 718 Av. 636	27 15 26 15 31 Av. 23	3,122

Court.	Population, 1915.	Civil Writes Entered.	Poor Debtor, etc.	Criminal Cases Begin.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Business in Units.
Fourth District Court of Bristol. (Class F.)	Attleboro, 18,480 North Attleboro, 9,398 Mansfield, 5,772 Norton, 2,587 36,237	145 168 206 170 123 Av. 162	17 17 15 7 4 Av. 12	1143 1219 1034 791 751 Av. 988	773 803 726 558 469 Av. 666	21 20 19 10 25 Av. 19	2,508
First District Court of Northern Worcester. (Class F.)	Athol, 9,783 Petersham, 727 Phillipston, 399 Royalston, 862 Templeton, 4,081 Gardner, 16,376 Hubbardston, 1,084 Dana, 712 Westminster, 1,594 35,609	127 141 154 180 192 Av. 159	8 8 8 3 11 Av. 8	598 656 754 786 749 Av. 705	309 380 381 383 312 Av. 349	10 34 32 23 19 Av. 24	1,913
Municipal Court of Brighton District. (Class F.)	Brighton District, 34,782	54 51 40 44 55 Av. 39	24 40 28 36 36 Av. 33	1576 1783 1740 2128 1898 Av. 1828	664 1010 902 1129 935 Av. 928	44 91 59 109 108 Av. 82	3,175
Municipal Court of Brookline. (Special act. Jus- tice \$2300, Clerk \$1380. St. 1914, c. 509. See St. 1917, c. 340.)	Brookline, 33,490	389 362 434 459 436 Av. 416	180 177 195 207 197 Av. 191	491 526 603 765 816 Av. 640	254 259 372 518 502 Av. 381	46 93 75 74 56 Av. 69	3,611
District Court of Eastern Essex. (Class F.)	Gloucester, 24,478 Rockport, 4,351 Essex, 1,677 30,506	304 403 372 361 429 Av. 374	58 88 67 88 37 Av. 68	1079 1272 1056 928 1048 Av. 1077	309 407 363 299 409 Av. 357	25 64 25 98 56 Av. 54	3,548
Police Court of Chicopee. (Class F.)	Chicopee, 30,138	116 126 111 84 120 Av. 111	0 0 0 0 0 Av. 0	620 708 850 923 1139 Av. 848	252 318 443 497 454 Av. 393	28 47 85 56 70 Av. 57	1,910
First District Court of Southern Mid- dlessex. (Class G.)	Ashland, 2,005 Framing- ham, 15,860 Holliston, 2,788 Sherborn, 1,696 Sudbury, 1,206 Wayland, 2,033 Hopkinton, 2,475 28,063	176 256 333 377 345 Av. 295	26 35 44 65 61 Av. 46	504 584 636 787 555 Av. 613	280 341 380 531 304 Av. 367	42 40 42 16 17 Av. 31	2,609

Court.	Population, 1915.	Civil Writs Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunkenness.	Delinquent Children Cases.	Average Annual Business in Units.
District Court of Western Norfolk. (Class G.)	Bellingham, 1,953 Foxborough, 3,755 Franklin, 6,440 Medway, 2,846 Millis, 1,442 Norfolk, 1,268 Walpole, 6,490 Wrentham, 2,414 Plainville, 1,408 27,016	120 126 103 105 102 Av. 111	10 33 24 17 25 Av. 22	360 422 414 498 431 Av. 425	246 254 288 374 301 Av. 293	48 26 17 29 16 Av. 27	1,371
District Court of Central Middlesex. (Class G.)	Acton, 2,151 Bedford, 1,365 Carlisle, 490 Concord, 6,681 Lincoln, 1,310 Maynard, 6,770 Stow, 1,127 Lexington, 6,538 25,432	118 91 111 114 145 Av. 116	11 5 8 11 22 Av. 11	597 547 630 705 755 Av. 647	334 274 318 496 504 Av. 385	14 7 9 13 27 Av. 14	1,662
District Court of Western Hampden. (Class G, except Justice \$2000. St. 1917, c. 333. See St. 1917, c. 340.)	Westfield, 18,411 Chester, 1,344 Granville, 784 Southwick, 1,365 Russell, 1,104 Blandford, 623 Tolland, 199 Montgomery, 230 24,060	228 270 233 180 204 Av. 223	11 20 23 16 11 Av. 16	918 1150 1077 1058 948 Av. 1028	451 611 600 634 468 Av. 553	18 16 20 56 70 Av. 36	2,800
District Court of Northern Berkshire. (Class G.)	North Adams, 22,035 Clarksburg, 1,114 Florida, 427 23,576	71 67 89 73 77 Av. 75	0 0 0 2 3 Av. 1	905 854 997 1015 972 Av. 949	297 267 335 351 304 Av. 311	56 48 87 45 92 Av. 66	1,767
Second District Court of Southern Worcester. (Class G.)	Blackstone, 5,689 Millville, 75 Uxbridge, 4,921 Douglas, 2,179 Northbridge, 9,254 22,043	42 75 51 45 47 Av. 62	6 5 9 1 2 Av. 6	363 292 346 361 333 Av. 327	178 161 201 194 201 Av. 187	5 6 10 0 5 Av. 6	794
Police Court of Marlboro. (Class H, except Clerk \$900. St. 1913, c. 483. See St. 1917, c. 340.)	Marlboro, 15,250 Hudson, 6,758 22,008	68 88 93 68 81 Av. 80	3 1 2 3 0 Av. 19	400 488 482 505 451 Av. 466	103 124 159 159 129 Av. 135	23 36 21 0 20 Av. 20	1,044
Third District Court of Plymouth. (Class G.)	Plymouth, 12,926 Kingston, 2,580 Plympton, 609 Pembroke, 1,337 Duxbury, 1,921 Marshfield, 1,725 Halifax, 638 21,726	102 125 103 118 118 Av. 113	6 31 25 17 17 Av. 19	366 442 345 420 376 Av. 390	167 240 255 298 310 Av. 254	38 48 34 48 42 Av. 42	1,381

Court.	Population, 1915.	Civil Wrts Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Busi- ness in Unia.
Police Court of Newburyport. (Class H.)	Newbury- port, 15,311 Newbury, 1,500 Rowley, 1,481 Salisbury, 1,717 West New- bury, 1,520 — 21,628 (St. 1917, c. 302.)	110 108 114 110 163 Av. 121	3 11 12 6 13 Av. 9	425 729 925 826 662 Av. 713	187 218 332 476 295 Av. 302	13 20 24 22 13 Av. 18	1,574
Fourth District Court of Plymouth. (Class H.)	Middle- borough, 8,631 Wareham, 5,176 Lakeville, 1,491 Marion, 1,487 Mattapoisett, 1,352 Rochester, 1,160 Carver, 1,701 — 20,998	84 59 95 88 80 Av. 81	3 6 5 8 11 Av. 7	318 308 392 402 359 Av. 356	201 185 261 275 226 Av. 230	13 20 11 19 24 Av. 17	1,000
Second District Court of Eastern Worcester. (Class G.)	Clinton, 13,192 Berlin, 865 Bolton, 789 Boylston, 743 Harvard, 1,104 Lancaster, 2,585 Sterling, 1,403 — 20,700	54 60 53 58 41 Av. 53	0 0 0 0 0 Av. 0	563 468 456 354 335 Av. 441	328 243 264 220 182 Av. 251	31 35 30 26 17 Av. 28	1,013
District Court of Western Worces- ter. (Class H.)	Spencer, 5,994 Brookfield, 2,059 North Brookfield, 2,947 West Brookfield, 1,283 Warren, 4,265 Hardwick, 3,596 New Brain- tree, 463 — 20,605	42 37 26 31 40 Av. 35	6 1 0 1 1 Av. 2	327 418 333 415 301 Av. 359	163 264 233 269 174 Av. 221	9 31 19 6 21 Av. 17	796
District Court of Peabody. (Class H.)	Peabody, 13,625 Lynnfield, 1,112 — 19,737						Newly created.
Third District Court of Southern Worcester. (Class H.)	Milford, 13,684 Mendon, 933 Upton, 2,036 Hopkdale, 2,663 — 19,316	85 45 79 87 69 Av. 73	8 16 20 15 15 Av. 15	324 363 299 367 373 Av. 345	152 230 171 197 160 Av. 182	15 13 7 7 8 Av. 10	943
District Court of Eastern Hamp- den. (Class H.)	Palmer, 9,468 Brimfield, 934 Monson, 5,004 Holland, 159 Wales, 337 Wilbraham, 2,621 — 18,423	23 23 37 21 39 Av. 27	0 0 0 0 0 Av. 0	464 476 491 555 377 Av. 473	186 233 276 339 171 Av. 241	3 7 2 17 15 Av. 9	987

Court.	Population, 1915.	Civil Writes Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Busi- ness in Units.
District Court of Leominster. (Class H.)	Leominster, 17,646	114 153 86 84 114 Av. 110	6 5 1 4 3 Av. 4	269 383 342 438 586 Av. 404	152 186 169 185 180 Av. 174	48 48 24 28 26 Av. 35	1,206
First District Court of Northern Mid- dsex. (Class H.)	Ayer, 2,779 Groton, 2,333 Pepperell, 2,839 Townsend, 1,812 Ashby, 922 Shirley, 2,281 Westford, 2,843 Littleton, 1,228 Box- borough, 326 17,333	42 48 64 68 63 Av. 57	4 1 1 10 10 Av. 5	428 582 678 965 720 Av. 675	272 356 559 870 543 Av. 520	30 25 25 6 12 Av. 20	1,580
District Court of Southern Norfolk. (Class H.)	Stoughton, 6,982 Canton, 5,623 Avon, 2,164 Sharon, 2,468 17,237	106 123 108 122 125 Av. 117	20 9 12 14 12 Av. 13	264 388 325 576 324 Av. 355	155 220 199 152 194 Av. 184	10 23 25 18 17 Av. 19	1,168
First District Court of Eastern Worcester. (Class H.)	South- borough, 1,898 West- borough, 5,925 Grafton, 6,250 North- borough, 1,797 15,870	37 38 64 37 46 Av. 44	0 4 1 2 2 Av. 2	158 191 203 187 142 Av. 176	97 123 104 105 86 Av. 103	14 20 16 10 8 Av. 14	531
Fourth District Court of Berk- shire. (Class H.)	Adams, 13,218 Cheshire, 1,535 Savoy, 524 Windsor, 375 15,652	80 86 54 52 51 Av. 65	1 1 0 4 5 Av. 2	570 622 641 622 486 Av. 568	321 343 404 383 318 Av. 354	24 18 23 15 22 Av. 20	1,291
First District Court of Barnstable. (Class H. except Clerk \$900. St. 1917, cc. 102, 340.)	Barnstable, 4,965 Bourne, 2,672 Yarmouth, 1,415 Sandwich, 1,560 Falmouth, 3,917 Marshpee, 283 14,762	146 138 150 217 335 283 Av. 197	19 16 16 15 12 Av. 16	223 245 185 292 274 Av. 238	173 177 141 256 230 Av. 195	11 20 16 19 26 Av. 18	1,486
Second District Court of Barn- stable. (Class H. except Clerk \$900. St. 1917, cc. 124, 340.)	Provincetown, 4,295 Truro, 663 Wellfleet, 936 Eastham, 545 Orleans, 1,166 Brewster, 763 Chatham, 1,667 Harwich, 2,179 Dennis, 1,822 14,056	66 63 61 93 122 Av. 81	5 9 11 9 10 Av. 9	122 116 179 258 169 Av. 169	110 98 178 237 156 Av. 156	13 24 24 36 17 Av. 23	794

Court.	Population, 1915.	Civil Writs Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Busi- ness in Units.
District Court of Southern Berk- shire. (Class H.)	Sheffield, 1,862 Great Bar- rington, 6,627 Egremont, 599 Alford, 271 Mt. Wash- ington, 95 Monterey, 353 New Marl- boro, 1,030 Sandisfield, 564 West Stock- bridge, 1,277 12,683 (St. 1917, c. 302.)	63 75 78 104 92 Av. 82	0 3 1 0 1 Av. 1	217 292 271 306 303 Av. 278	128 167 176 199 160 Av. 166	22 11 9 7 8 Av. 10	876
Second District Court of Essex. (Class H.)	Amesbury, 8,543 Merrimac, 2,101 Salisbury, 1,717 12,361 (St. 1917, c. 302.)	50 68 50 47 41 Av. 51	5 5 5 5 5 Av. 5	279 307 183 365 395 Av. 306	122 157 104 116 205 Av. 141	15 4 20 13 4 Av. 11	734
Police Court of Lee. (Special act. Placed in Class H. St. 1905, c. 443.)	Lee, 4,481 Lenox, 5,242 Becket, 973 Stockbridge, 1,001 Tyringham, 327 Otis, 442 Sandisfield, 564 11,930 (St. 1917, c. 302.)	13 25 27 37 37 442 564 11,930 (St. 1917, c. 302.)	0 0 0 0 0 0 0 0 0 Av. 0	410 369 319 282 223 223 162 162 162 Av. 203	254 207 199 195 162 162 162 162 162 Av. 203	7 1 4 2 10 10 10 10 10 Av. 5	874
District Court of Natick. (Class H.)	Natick, 11,119						Newly created.
District Court of Eastern Hamp- shire. (Class H.)	Ware, 9,346 Enfield, 806 Greenwich, 426 Prescott, 299 10,877	30 17 15 20 18 Av. 20	6 10 5 3 1 Av. 5	205 230 201 228 238 Av. 220	77 94 96 114 99 Av. 96	8 9 7 11 8 Av. 9	444
District Court of Eastern Franklin. (Class I, except Jus- tice \$1200. St. 1917, c. 203. See St. 1917, c. 340.)	Orange, 5,379 Erving, 1,168 Warwick, 477 Wendell, 388 New Salem, 625 8,037	17 19 25 12 13 Av. 17	0 0 0 0 0 Av. 0	62 70 102 111 117 Av. 92	38 49 67 60 60 Av. 55	3 0 9 0 0 Av. 2	236
Third District Court of Essex. (Class I, except Jus- tice \$1200. St. 1917, c. 323. See St. 1917, c. 340.)	Ipswich, 6,272	28 50 68 43 49 Av. 48	1 3 2 3 3 Av. 2	316 218 266 273 274 Av. 269	167 143 110 113 156 Av. 138	3 1 0 4 4 Av. 2	655

Court.	Population, 1915.	Civil Writs Entered.	Poor Debtor, etc.	Criminal Cases Begun.	Criminal Cases Other than Drunken- ness.	Delin- quent Children Cases.	Average Annual Busi- ness in Units.
District Court of Winchendon. (Class I.)	Winchendon, 5,908	38 18 20 26 27 Av. 26	2 0 3 0 0 Av. 1	216 220 216 195 186 Av. 207	65 47 52 73 42 Av. 56	12 2 1 3 6 Av. 5	405
District Court of Dukes County. (Class J.)	Oak Bluffs, 1,245 Edgartown, 1,276 Tisbury, 1,324 West Tisbury, 441 Chilmark, 288 Gay Head, 175 Gosnold, 155 4,904	16 43 19 26 80 175 155 Av. 37	0 3 0 4 16 5 0 Av. 5	99 69 93 114 112 122 0 Av. 97	82 50 85 83 67 73 0 Av. 73	2 0 1 0 13 3 0 Av. 3	371
Police Court of Williamstown. (Special act. Jus- tice \$1200, Clerk \$720. St. 1913, c. 414. See St. 1917, c. 340.)	Williams- town, 3,981 New Ash- ford, 92 4,073	4 9 12 6 8 Av. 8	0 0 0 0 0 Av. 0	65 71 39 67 51 Av. 59	46 46 31 56 32 Av. 42	6 15 9 12 3 Av. 9	159

The report of the Executive Council (1918, House Doc. 1175) recommends a new schedule as follows:

Municipal Court of the City of Boston: Chief Justice, \$6,500. Eight Associate Justices \$6,000. Two clerks, \$4,200. Assistant clerks, civil and criminal: 1st, \$2,940; 2d, 3d 4th, \$2,520; 5th, 6th, 7th, \$1,890.

Boston Juvenile Court: Justice, \$3,000. Clerk, \$1,500.

Classified courts:

Class.	Population.	Salary of Justice.	Salary of Clerk.	Salary of Assistant Clerk.
A	Above 150,000	\$5,000	\$3,500	\$2,100
B	122,000 to 150,000	4,500	3,150	1,890
C	95,000 to 122,000	4,000	2,800	1,680
D	65,000 to 95,000	3,000	2,100	1,260
E	50,000 to 65,000	2,500	1,750	1,050
F	30,000 to 50,000	2,250	1,575	
G	20,000 to 30,000	2,000	1,400	
H	12,000 to 20,000	1,500	1,050	
I	6,000 to 12,000	1,250	875	
J	Less than 6,000	1,000	700	

Without regard to population, the Municipal Court of the South Boston District is placed in Class C, and the Municipal Court of the Charlestown District is placed in Class D. Second assistant clerks are given a salary equal to 45% of the salary of the clerk.

QUARTERLY TITLE INDEX TO LEGAL PERIODICALS.

AMERICAN BAR ASSOCIATION JOURNAL.

OCTOBER, 1917.

War Resolutions.

A Word from the President. Walter George Smith.

Proceedings of the Special Conference of Delegates from Bar Associations,
held at Saratoga Springs, N.Y., Monday, September 3, 1917, 10 A.M.

Speeches at the Annual Dinner in Honor of Elihu Root, Grand Union Hotel,
Saratoga Springs, Thursday evening, September 6, 1917.

Response of H. Hartley Dewart, K.C., Representative of the Canadian Bar
Association.

Response of Andrew A. Bruce.

" " Job E. Hedges.

" " Elihu Root.

" " Walter George Smith.

Founding of the American Bar Association. Simeon E. Baldwin.

Tax of War Profits in Holland. Edwin M. Borchard.

JANUARY, 1918.

Committees of American Bar Association for 1917-1918.

Memorial for Appellate Courts.

Counsel to Registrants under Selective Service Law.

The United States Law Journal of 1822.

The Socialist Menace to Constitutional Government.

AMERICAN JOURNAL OF INTERNATIONAL LAW.

OCTOBER, 1917.

The Special Diplomatic Mission of the United States to the Provisional
Government of Russia.

Address of Elihu Root, Chairman, to the Council Ministers, Petrograd,
June 15, 1917.

A Unique International Problem. Robert Lansing.

The International High Commission and Pan-American Coöperation. W.
G. McAdoo.

Shall there be War after the War? The Economic Conference at Paris.
John Bates Clark.

Violation of Treaties: Bad Faith, Non-execution and Disregard—I.: Bad
Faith in Contracting. Denys P. Myers.

The American Attitude toward Capture at Sea. Harold Scott Quigley.

AMERICAN LAW REVIEW.

SEPTEMBER-OCTOBER, 1917.

The War and the Constitution. Hon. Geo. B. Rose.

The American Judicial Veto. Noel Sargent.

Should the Dartmouth College Decision be recalled? J. C. J.

NOVEMBER-DECEMBER, 1917.

The Power and Duty of the State to settle Disputes between Employer and Employees. George S. Ramsay.

Do Courts make Laws, and should Precedents command the Obedience of Lower Courts? Robert Sprague Hall.

Procedure of a Bank or Corporation under Federal Revenue Legislation. Frederick Thulin.

Concerning Divers Notable Stirs between Sir Edward Coke and His Lady. Jesse Turner.

Dangerous Doctrines. Henry A. Forster.

JANUARY-FEBRUARY, 1918.

A Council on Legal Education and Admissions to the Bar.

The Teaching of Legal Ethics. George P. Costigan, Jr.

Suggestions as to a Methodical Study of English Legal Literature. Hampton L. Carson.

The Reichstag and German System of Government. Hon. S. D. Fess.

The Philosophy of German Autocracy.

The Bar Examination — Its Proper Time and Length. Edwin C. Goddard.

Law as a Cultural Study. Thomas Reed Powell.

Improvement of Legal Education and of Standards for Admission to the Bar. Walter W. Cook.

Effect of the War upon Law School Attendance.

CALIFORNIA LAW REVIEW.

SEPTEMBER, 1917.

British Emergency Legislation during the Present War. Ludwik Ehrlich.

The Execution of Wills in California. (Concluded from July issue.) Nat Schmulowitz.

Some Reasons why the Code States should adopt the Uniform Sales Act. (Continued from July issue.) Lauriz Vold.

NOVEMBER, 1917.

The California Constitutional Convention of 1878-1879. Noel Sargent.

The Adoption of the Negotiable Instruments Law in California. Maurice E. Harrison.

Some Reasons why the Code States should adopt the Uniform Sales Act. Lauriz Vold.

JANUARY, 1918.

The Psychologic Study of Judicial Opinions. Theodore Schroeder.
 The California Constitutional Convention of 1878-1879. Noel Sargent.
 Constitutional Limitations on the War Power. Henry Winthrop Ballentine.
 School of Jurisprudence Notes.

COLUMBIA LAW REVIEW.

NOVEMBER, 1917.

The Federal Valuation Act. Henry Hull.
 Court Decisions and the Common Law. Charles E. Carpenter.
 Damages for Breach of Charterparty. J. L. Thorndike.

DECEMBER, 1917.

German Laws relating to Payments to Alien Enemies. Charles Henry Huberich.
 The Nature of a Patent Right. Thomas Reed Powell.
 Implications of *Lumley v. Wagner*. George L. Clark.

JANUARY, 1918.

War Powers in the Constitution of the Commonwealth of Australia.
 Robert Gordon Menzies.
 An Unsolicited Report on Legal Education. Albert M. Kales.
 The Procedure in the *Cour d' Assises* of Paris. Robert Ferrari.

CORNELL LAW QUARTERLY.

MAY, 1917.

The Organization of the Courts for the Better Administration of Justice.
 William L. Ransom.
 The Webb-Kenyon Law Decision. Samuel P. Orth.
 Methods of teaching Practice. O. L. McCaskill.
 The Adamson Law Decision. Charles Kellogg Burdick.

NOVEMBER, 1917.

The Proposed Uniform Conditional Sales Act. George Gleason Bogert.
 Rule-making Authority. William Hazlitt Smith.

JANUARY, 1918.

Contracts to keep up the Price on Resale and to buy or use Other Articles
 in Connection with Those sold. Albert M. Kales.
 John G. Johnson: A Great American Lawyer. Hampton L. Carson.

HARVARD LAW REVIEW.

NOVEMBER, 1917.

(Special Number.)

The Law and the State. Leon Duguit.

DECEMBER, 1917.

- Contracts to refrain from doing Business or from entering or carrying on an Occupation. Albert M. Kales.
 The State as Defendant under the Federal Constitution: The West Virginia Debt. Controversy. William C. Coleman.
 Monopolizing at Common Law and under Section Two of the Sherman Act. Edward A. Adler.
 Some Problems in Specific Performance. George L. Clark.

JANUARY, 1918.

- Indirect Encroachment on Federal Authority by the Taxing Powers of the States. Thomas Reed Powell.
 The School of Jurisprudence. Nathan Isaacs.
 The Sherman Act. Albert M. Kales.
 Premiums and Discounts in Trust Accounts. Henry White Edgerton.

ILLINOIS LAW REVIEW.

OCTOBER, 1917.

- Preparation and Presentation of Cases in Courts of Review. Orrin N. Carter.
 Conservation and the Police Power. Noel Sargent.
 The Philosophy of State Legislation. Nathan William MacChesney.

NOVEMBER, 1917.

- Methods of Work in Courts of Review. Orrin N. Carter.
 Judicial Notice in the Law of Illinois. Homer H. Cooper.
 Law from Lay Classics — I.: *The Citizen of the World in Westminster Hall.*

DECEMBER, 1917.

- Lawyers of England — How They are made. James H. Winston.
 Judicial Notice in the Law of Illinois. Homer H. Cooper.
 A Criticism of Our Law Schools. Henry Jackson Darby.

JANUARY, 1918.

- Treason under the Constitution of the United States. Hayes McKinney.
 The Judicial Superintendent in China. Charles Sumner Lobingier.
 Law from Lay Classics — II.: *The Art of Verbosity.*
 The Legal Ethics Clinic of the New York County Lawyers' Association.

JURIDICAL REVIEW.

OCTOBER, 1917.

- Recent Leading English Cases. Alfred Hildesley, Barrister-at-law.
 Recent Leading Scots Cases. Sheriff Dunbar.
 The Adventures of David Haggart. William Roughead.
 The Creative Function of Government — II. W. W. Lucas.
 Judges' Avocations. *Amicus Curia.*

JANUARY, 1918.

- The Clan M'Caig. W. M. Gloag.
 Mrs. MacKinnon's Misfortune. William Roughead.
 The Persistence of the Common Consent in British Politics. W. W. Lucas.
 Soldiers' and Sailors' Wills. L. V. Holt.
 Does a Privileged Occasion justify a Reckless Slander? J. Campbell Lormer, K.C., and Sheriff.

LAW QUARTERLY REVIEW.

OCTOBER, 1917.

- Law Schools and Legal Practitioners in the United States of America.
 Harold D. Hazeltine.
 Separation and Divorce. Malcolm M'Ilwraith.
 Restraints on Alienation—II. Charles Sweet.
 The Legal Relations between an Occupying Power and the Inhabitants. L. Oppenheim.
 "Natural" Classification in Politics. H. J. Randall.
 Some Original Scraps of Paper. C. A. Hereshoff Bartlett.

MICHIGAN LAW REVIEW.

NOVEMBER, 1917.

- War and Law. Charles H. Hamill.
 How a Conditional Limitation operates. Harold M. Bowman.

DECEMBER, 1917.

- A Modern Evolution in Remedial Rights—The Declaratory Judgment.
 Edson R. Sunderland.
 Equitable Servitudes. George L. Clark.

JANUARY, 1918.

- The Law of Blasphemy. R. W. Lee.
 State Regulation of the Canal Corporation in Colorado. Leonard P. Fox.

SOUTHERN LAW QUARTERLY.

NOVEMBER, 1917.

- The Suspension of the Writ of Habeas Corpus. Rufus E. Foster.
 Compulsory Military Service. William Irwin Grubb.
 Notes on a Disputed Point in the Law of Deceit. William Cullen Dennis.

UNIVERSITY OF PENNSYLVANIA LAW REVIEW.

DECEMBER, 1917.

- Procedural Reform in the Federal Courts. Everett P. Wheeler.
 The Fusion of Law and Equity. Edward Robeson Taylor.
 Intervening Impossibilities of Performances as affecting the Obligations of Contracts. William J. Conlin.
 The Surety. William H. Lloyd.

YALE LAW JOURNAL.

NOVEMBER, 1917.

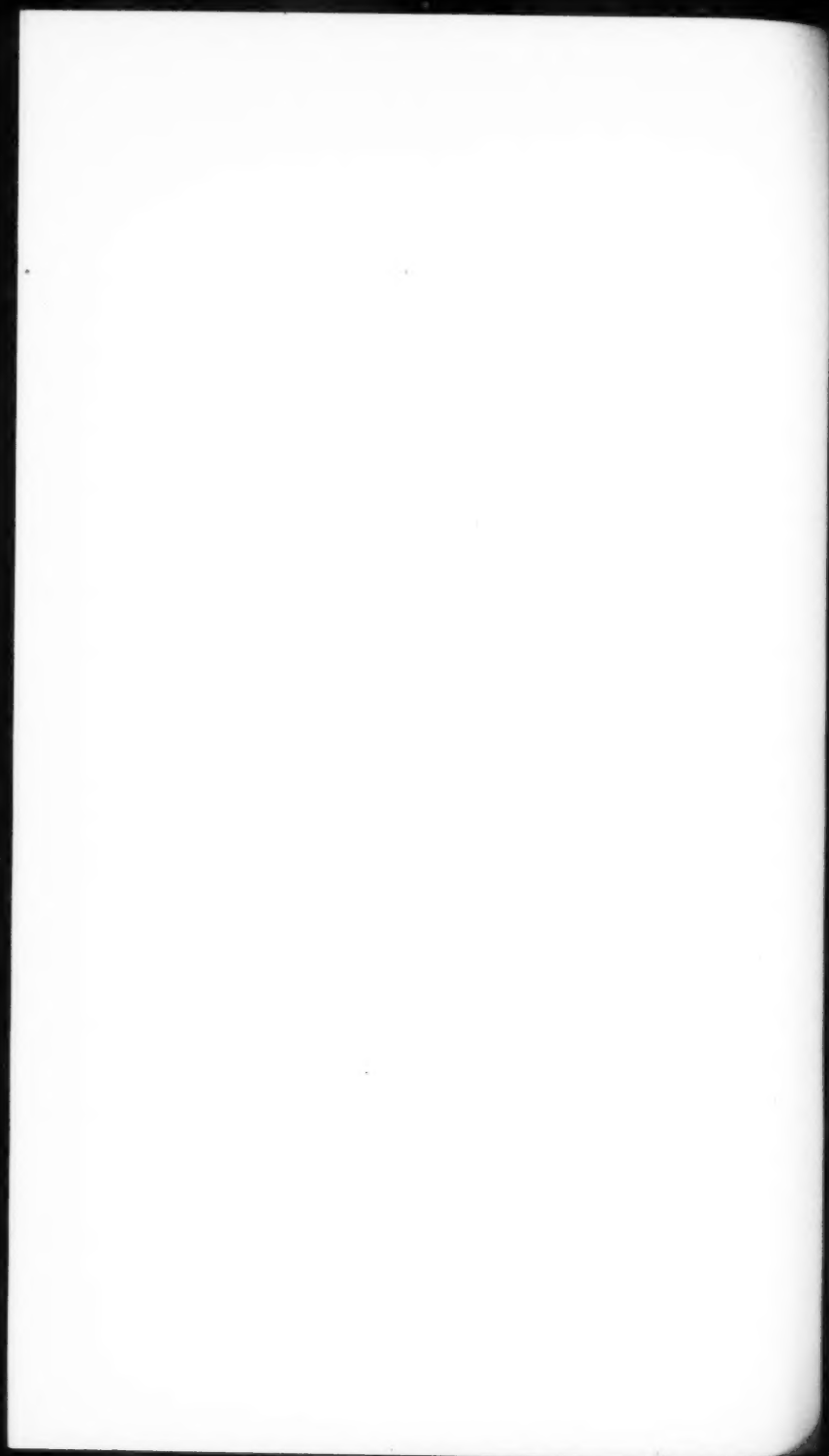
- Law as an Expression of Community Ideals and the Lawmaking Functions of Courts. John E. Young.
 The Standardizing of Contracts. Nathan Isaacs.
 Matrimonial Domicile. Herbert F. Goodrich.
 Faulty Analysis in Easement and License Cases. Wesley Newcomb Hohfeld.

DECEMBER, 1917.

- Surviving Fictions. Jeremiah Smith.
 Alien Enemy Persons, Firms, and Corporations in English Law. Cyril M. Picciotto.
 Advancing Freight Rates to increase Revenues. George W. Rightmire.
 General Assignment and the Bankruptcy Law. Marshall W. Hagar.
 The Development of Principle in Trespass. George F. Deiser.
 The Legal Position of the British Army in France. P. G. E. Gede.

JANUARY, 1918.

- Inter-Citizenship: A Basis for World Peace. Orrin K. McMurray.
 Surviving Fictions. II. Jeremiah Smith.
 What is giving Aid and Comfort to the Enemy? Charles Warren.
 International Copyright Relations of the United States. Herbert A. Howell.
 New Trial in Present Practice. William Renwick Riddell.
 Does a Pre-existing Duty defeat Consideration?—Recent Noteworthy Decisions. Arthur L. Corbin.



V
3

R
B
B

1
8

XU

Entered as Second-Class Matter at the Post Office at Boston.

V
C
C

R
E
E

1
8

XU